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BENGAL SECRETARIAT LIBRARY

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION

1891.

REID'S BREWERY COMPANY, LIMITED *v.* MALE.

1891
Feb 9.

Revenue—Income Tax—Profits of Trade—Brewers carrying on Business of Bankers and Money-lenders—Bad Debts on Loans—Deduction from Profits of Brewery—5 & 6 *Vict. c.* 35, *s.* 100, *Sched. D*—16 & 17 *Vict. c.* 34.

The appellants carried on the business of brewers, and also as a branch or adjunct of their brewery business, the business of bankers and money-lenders, and in the course of such business lent money to their customers on security, and received money on deposit from their customers, who were allowed to draw bankers' cheques or orders on the appellants. In no case was any loan or advance made by way of permanent investment, but the same was taken only in connection with the current dealings and transactions of the customer with the appellants, and, in the event of such current dealings or transactions terminating, the loan or advance was required to be paid off, and the account closed. The profits of the brewery were largely increased by the addition of the banking and money-lending business, and the loans were necessary to enable the appellants to realize profits. They claimed to deduct from an assessment to the income tax on profits from trade, bad debts in respect of loans to customers:—

Held (distinguishing *Watney* v. *Musgrave* (5 Ex. D. 241)), that, on the facts

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REID'S BREWERY CO. v. MALE

above stated, the appellants must be taken to have carried on one business only, that the money advanced to customers was used in the business, and not capital invested, and that the appellants were entitled to the deduction claimed.

CASE stated by Commissioners of Income Tax on appeal against an assessment made by them under Sched. D of 16 & 17 Vict. c. 34, in respect of the profits from trade as carried on by the appellants at their brewery, Clerkenwell Road, Middlesex.

It appeared that in the return made by the appellants for assessment certain items in respect of "bad debts" incurred in 1886, 1887, and 1888, had been deducted in arriving at the balances of profit upon which the return had been computed. These "bad debts" embraced not only ordinary debts arising from the trade of brewers, but also losses sustained on loans advanced by the appellants on the security of public-houses, with which their business was largely connected, to their customers (that is, persons who dealt or who had agreed to deal with the company). The average amount of these losses on loans for the three years 1886, 1887 and 1888—as stated by the appellants—was 16,517*l.* The Special Commissioners disallowed the deduction of 16,517*l.*, and consequently assessed the appellants for their brewery profits under Sched. D in the sum of 110,213*l.*, being the amount of profits returned by the company, with the addition thereto of the 16,517*l.*

At the appeal, in answer to an inquiry in what way the losses arose, one of the appellants stated that when they made an advance to a customer on the security of a public-house, and the public-house was sold, if the security did not realize the amount advanced, the company wrote off the loss as a bad debt.

The following statement of facts was made by the appellants as explanatory of their case:—

(1.) "Messrs. Reid & Co., for many years prior and up to the 7th of July, 1888, carried on the business of brewers, and in connection therewith and as part thereof the branch business of bankers and money-lenders, limited to the customers and connections of the firm.

(2.) "The appellants took over the business of Reid & Co. by purchase and valuation, including therein the business or branch business of bankers and money-lenders.

(3.) "It was the custom, habit, and usual practice of manufacturing brewers, at any rate in London, to carry on the business of bankers and money-lenders as a branch or adjunct of their brewing business, such business being strictly carried on with the customers and connections of the brewery.

(4.) "Since the purchase and transfer, the appellant company has, pursuant to sub-s. 10 of art. 4 of their memorandum of association, also carried on the business of bankers and money-lenders as therein authorized.

(5.) "In the course of such business Messrs. Reid & Co. and the appellants advanced money by way of loan or advance to or on behalf of their customers, and upon various classes of security, and amongst others on deposit of deeds, on mortgage, on promissory notes, and on acceptances. They received money on deposit from their customers, and cheques or orders were allowed to be drawn upon the appellants which were accepted and treated by other London bankers as ordinary bankers' cheques. They also collected bills for customers when they became due.

(6.) "In no case was any loan or advance made by way of permanent investment, whether by way of deposit of deeds, mortgage, promissory note, or otherwise, but the same was taken only in connection with the current dealings and transactions of the customer with the appellants; and in the event of such current dealings or transactions terminating, the loan or advance was required to be paid off, and the account closed.

(7.) "The brewing profits of the appellants and of Reid & Co. has always been greatly increased by reason of the addition of such business of banking and money-lending as above described; and to enable them to realize their extensive profits, such loans and advances were essentially necessary, and unless such loans and advances were made for customers, the brewing business of London brewers could not be carried on at a profit.

(8.) "It has always been the practice of Messrs. Reid & Co., and subsequently of the appellants, to make returns and pay income tax on profits arising from banking and money-lending, and if on revaluation of loans any sums written off or undervalued in the previous year's balance-sheet have been recovered, or considered to be good, they have returned and paid

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on the same as profits, and in like manner they have made deduction of actual or probable losses incurred on the same basis.

(9.) "During the three years ending December, 1888, losses were incurred by Messrs. Reid & Co. and the appellants, on the valuation of the debts of the banking and money-lending business or branch, amounting to the sum of 16,517*l.* 7*s.* 5*d.* (viz., on deposit of deeds, 304*l.* 8*s.*; on mortgage, 16,091*l.* 15*s.* 9*d.*; on notes and acceptances, 121*l.* 3*s.* 3*d.*), and of that amount 7917*l.* 10*s.* 3*d.* has been written off in the books of the appellants as bad and irrecoverable, and 8599*l.* 17*s.* 2*d.* has been charged against the profits as the amount which it was believed would, on realization, prove to be bad. (1)

"On the above facts the appellants contended—

"That the assessment of 110,213*l.* was excessive, as they had not made profits or gains to that amount;

"That they were entitled to write off, by way of deduction from their taxable profits, such losses, or estimated losses, as they had sustained in the debts of the branch of the brewing business relating to loans and advances.

"In the alternative that, under s. 101 of 5 & 6 Vict. c. 35 (2), if the said debts, arising from loans and ad-

(1) The articles of association of the appellant company empowered them to carry on the brewing and other businesses, and (inter alia) to lend money to such parties and on such terms as might seem expedient, and in particular to customers of and persons having dealings with the company, and to guarantee the performance of contracts by members of or persons having dealings with the company, to discount bills, to receive money and valuables on deposit, and to transact any of the business of a banker which might seem to the company expedient.

(2) By 5 & 6 Vict. c. 35, s. 100, Sched. D, r. 1, the duties to be charged in respect of any trade shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade upon a fair and just average of three years, and rule 3 states what sums shall not be deducted. Sect. 101 provides that nothing in the Act contained shall be construed to restrain any person carrying on two or more distinct trades, the profits whereof are chargeable under Sched. D, from deducting or setting against the profits acquired in one the excess of the loss sustained in any other over and above the profits thereof.

By 16 & 17 Vict. c. 34, duties are granted (Sched. D) for and in respect of the annual profits or gains arising from any trade.

vances, were not to be regarded as part of the assets of the said brewery business, the appellants were nevertheless entitled to deduct or set the loss occurring in their business of bankers and money-lenders against the profits acquired by them as brewers."

The Special Commissioners, having regard to the decision in the case of *Watney* v. *Musgrave* (1), considered that the sums advanced by the appellants on the security of public-houses were sums employed as capital for the purpose of extending their business as brewers, and that losses arising therefrom were not losses sustained in any trade or concern in the nature of trade distinct from such business, and determined that they could not admit as deductions, within the provisions of the Income Tax Acts, the sums claimed by the appellants as losses on deposit of deeds and on mortgage, amounting together to 16,396*l.* 3*s.* 9*d.*

Sir Horace Davey, Q.C. (*Pollard* and *Hewitt*, with him), for the appellants. The question is whether the appellants are entitled to set off against profits, bad debts made in the last three years through lending money in accordance with the established custom of London brewers. The bad debts were incurred in the brewing business. By the express terms of the articles of association the appellants may carry on the business of lending money or acting as bankers for their customers. This is found to be a recognised part of the business of London brewers, and is a branch of the general business. The branch is a necessary part of the brewing business, which would make no profits without it. The money lent to customers is not a mere investment of spare capital or a permanent investment.

In *Watney* v. *Musgrave* (1) there was no finding that the banking and money-lending was carried on as part of the brewing business. The bad debts from the sale of beer may be deducted, and so likewise the bad debts from loans to customers. They are both necessary trade expenses, to be taken into account in estimating profit and loss, before considering any deduction within the meaning of the Income Tax Acts. Secondly, if

(1) 5 Ex. D. 241.

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this is not one business, but two, then, under 5 & 6 Vict. c. 35, s. 101, the loss on the money-lending business may be set off against the profit in the brewery, as both would be chargeable under Sched. D.

Danckwerts (*Sir R. E. Webster, A.G.*, with him), for the Crown. The deductions cannot be maintained. In *Coltness Iron Company* v. *Black* (1), where a mine owner sought to deduct from the gross earnings of his mine, in a particular year, a sum to represent that year's depreciation of all pits in the mines wherever sunk, the House of Lords held that this could not be done, and Lord Cairns, at p. 324, said: "It may be proper for a trader, or for a trading company, to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade and spent as trade profits. But I am clearly of opinion that the owner of a mine cannot, quâ owner, thus manipulate his accounts when the question is, under s. 60 of the principal Act, What is the 'amount of profits received' from the mine in each of the five years upon which the average is to be taken?" The same doctrine was applied in *Gresham Life Assurance Society* v. *Styles* (2), where an insurance society claimed to deduct from their profits sums paid by them in discharge of annuities, and the Court of Appeal held that the annuities were paid out of "profits and gains" within s. 102, and were therefore chargeable with income tax in the hands of the society, and the Court said that "profits and gains" in rule 4 mean the credit side of the account. The moneys on equitable deposit and mortgage ought not to be taken into account on either side of it. Income tax on mortgages is deducted at the source as an annual sum paid by the mortgagor; but it is otherwise on short loans: see *Mosse* v. *Salt*. (3) Interest, whether on short or long loans, is a separate matter of taxation, and must, therefore, be kept out of the account altogether in arriving at the annual profits and gain, as appears from the judgment of Lord Esher, M.R., in *Clerical Medical and General Life Assurance Society* v. *Carter*. (4) Interest upon a loan by a banker to a

(1) 6 App. Cas. 315.
(2) 25 Q. B. D. 351.
(3) 32 Beav. 269, per Romilly, M.R., at p. 276.
(4) 22 Q. B. D. 444.

customer for a less period than a year is not within the words "any yearly interest of money, or any annuity or other annual payment," in 16 & 17 Vict. c. 34, s. 40, and therefore the customer is not entitled to deduct income tax from such interest: *Goslings and Sharpe* v. *Blake.* (1) A banker or money-lender who lends money at interest is not entitled to deduct losses of principal, but only bad debts in respect of interest. If the interest is received, he is taxed on it without deduction. So that, even if the business were treated as two distinct businesses, the appellant would be unable to avail himself of a set-off. Loss of capital may not be deducted as a bad debt under Sched. D, first case, rule 3, or otherwise money-lenders would be in a better position with respect to the income-tax than other persons. Loss through removal of machinery is not a matter for deduction: *Smith* v. *Westinghouse Brake Co.* (2) There is no difference between the investment of capital in machinery and in loans which are lost. Money advanced to the appellants' customers is not expended wholly and exclusively for the purposes of the trade: Sched. D, r. 1, of rules applying to first and second cases. It is not like a trade advertisement. The purpose and not the motive of the loan must be regarded. The purpose was to get interest on the money, although the lenders hoped that the borrower might deal with them. Money paid on taking over contracts has been held not to be the subject of deduction from profits on them: *City of London Contract Corporation, Limited* v. *Styles.* (3) The fact that the money was lent to be repaid conclusively shews that it is capital. *Watney* v. *Musgrave* (4) is in point. There, instead of lending money, the brewers bought leases, and paid premiums for them; but the Court held that the premiums ought not to be deducted from the assessment. The money sought to be deducted as an expense of trade must be expended in the year and for the purposes of the year. As Grove, J., said in *Gillatt* v. *Colquhoun* (5), the assessment must be "the annual assessment of profits and gains, less the annual

(1) 23 Q. B. D. 324.

(2) 2 Income Tax Cases, part xxxv. p. 357.

(3) 2 Income Tax Cases, part xxxiii. p. 239.

(4) 5 Ex. D. 241.

(5) 2 Income Tax Cases, part xxvii. p. 76.

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expenses." If the appellants carry on two concerns within the meaning of the Acts, the losses in the one are not such as may be set off against the profits in the other.

POLLOCK, B. I am of opinion that this appeal should be allowed. The question is whether a deduction disallowed by the commissioners ought to be allowed by this Court. The appellants carried on the trade of brewers, and, in addition, a business which is called in the case the business or branch business of bankers and money-lenders, in accordance with the custom, habit, and usual practice of manufacturing brewers. If the banking and money-lending were an independent business, I think that s. 101 of 5 & 6 Vict. c. 35, would apply, and the appellants would be entitled to deduct or set against the profits acquired in one of the concerns the excess of the loss sustained in the other. But I think that the banking and money-lending is carried on as an adjunct and ancillary to the business of brewers, and that it is all one business. Therefore, the real question arguable seems to me to be whether the money so used or expended, as stated in the case, is to be treated as capital account. If it be capital account invested, then it comes within the express provision of the Act, that no deduction is to be made on that account. But I think that it would be a fallacy to call this money so dealt with by the appellants capital invested. In the first place, it is found on the facts that "in no case is any loan or advance made by way of permanent investment, whether it be by way of deposit of deeds, mortgage, promissory note, or otherwise." That might not be, perhaps, in itself sufficient, but the description of the course of business shews beyond doubt that this is not capital invested; it is capital used by the appellants, but used only in the sense that all money laid out by traders, whether in purchase of goods, be they traders only, or raw materials, be they manufacturers, or on loans in the case of money-lenders or pawnbrokers, is used. It is used, and is out of capital, but is not invested in the ordinary sense of the word. When that is so found, the decisions cited by the learned counsel for the Crown in cases of capital invested become immaterial. I agree with him that we are not to deal with the Income Tax Acts as if we were taking an account

between partners, or in winding up a going concern. No doubt cases of hardship arise on the Acts. Some come within the very words of the Acts, and some within the meaning ascertained by inference drawn from them in reported cases. In *Gillatt* v. *Colquhoun* (1), it was held that the depreciation of leasehold premises purchased and used for trade purposes could not be deducted; and in *Smith* v. *Westinghouse Brake Co.* (2), where a company, having large machinery, had to move it from one country to another, the displacement, which was a loss as between partners, was considered to be certainly not a deduction under the Act. But if I have taken the true view of the present case, I see no great difficulty in dealing with it. It is the ordinary case of persons who, before making up their accounts and shewing profits—not merely as between partners, but under the Income Tax Acts—are entitled to this deduction, because it is clear from Sched. D that what the commissioners have to arrive at is the profits. There is, however, one difficulty to be met in this case, viz., that in *Watney* v. *Musgrave* (3) it was decided that a firm of brewers, who, in order to increase the sale of their beer and to increase their profits, purchased the leases of public-houses, which they let to tenants who contracted to buy from the brewers all the beer to be sold in the house, were not entitled to any allowance in respect of the premiums that were paid upon those leases. But I find no real difficulty in that decision if it is confined to the case itself. It might be an advantageous investment of the capital of brewers to purchase out of that capital a number of cottages, and, between partners, such purchases might be taken into account before they arrived at the profit of the business. That is the case put by Hawkins, J., of houses built in order that the inhabitants might deal with the brewery. In such a case the money could not be said to be money expended in the business of brewers before they made their money. I admit that there are some observations by Kelly, C.B., which might militate against our present decision; but he probably did not anticipate cases which might arise in the future on somewhat different facts. Those observations are not, however,

(1) 2 Income Tax Cases, part xxvii. p. 76.
(2) 2 Income Tax Cases, part xxxv. p. 357. (3) 5 Ex. D. 241.

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binding on us, and I do not think they would have been made on such a case as this. Our judgment must be for the appellants.

CHARLES, J. I am of the same opinion. I do not think that any question arises under s. 101, because I think that the proper inference of fact to draw from the agreed statements of fact in this case is that the appellants carry on one business, and not two. I think that the legitimate conclusion is that the appellants carry on the brewing business with the business of money-lending as a branch or adjunct to it. Then, are they entitled to exemption of this sum of 16,000*l.*? I think that they are. The argument of the learned counsel for the Crown deserves attentive consideration. He endeavoured to induce us to regard this payment as a capital expenditure; and, if it be a capital expenditure, then the deduction of it is expressly forbidden by the 3rd rule of the first case of Sched. D. It appears to me that it is not an investment of capital at all, but, having regard to the findings of the case, that it is a use of money by the appellants in the course of their business. I agree with my learned brother that, in arriving at the balance of profits and gains upon which the assessment is to be made, this sum—not being a capital expenditure in the sense which I have indicated—is an expense which they may properly deduct. I think that they are entitled to it by way of actual deduction under the first of the rules, applicable to both the First and Second Cases of Sched. D. That 1st rule provides: "That in estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern." I think that, upon the findings of the case, this money was money laid out and expended exclusively for the purpose of the brewing trade carried on by the appellants; and, that being so, it is a legitimate subject of deduction in arriving at the balance of the profits and gains, even though it ought not in the first instance to be deducted from the profits of the concern.

For these reasons, I agree with my learned brother that our judgment ought to be for the appellants, and I also desire to express my concurrence in the observations that he has made upon previous cases which have been decided upon matters cognate to the present.

Appeal allowed.

Solicitors for appellants: *W. H. Withall & Co.*

Solicitor for respondent: *The Solicitor of the Inland Revenue.*

J. R.

[IN THE COURT OF APPEAL.]

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Feb. 6.

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Innkeeper—Liability—Loss of Guest's Property—Onus of Proof—26 & 27 Vict. c. 41, s. 1.

The plaintiff arrived early in the morning at the defendants' hotel (which was entitled to the benefit of 26 & 27 Vict. c. 41) and asked for a bedroom. He was told that the hotel was full, but that there was one room then vacant, which had been engaged by a lady and gentleman who were expected to arrive in the course of the day, and that he could make use of it for the purpose of washing and dressing. He was then shewn to the room, and his luggage, including a dressing-bag, was taken into it by the hotel porter. After entering the room the plaintiff opened the bag and took out of it a stand, which contained brushes and other articles of the toilet. In the drawer of the stand were some valuable trinkets. The plaintiff placed the stand on the dressing-table in the room. When he had finished washing and dressing he went downstairs to the coffee-room and had breakfast. He left the door of the bedroom unlocked, and he left the stand of the dressing-bag just as it was on the table. He paid for his breakfast, left the hotel, and did not return till about midnight. About 9 P.M. the lady and gentleman, who had engaged the room, arrived, and were shown to it by the page-boy of the hotel. By the direction of the head porter the boy moved all the plaintiff's luggage, including the stand, out of the room into the corridor, and left it there. When the plaintiff returned to the hotel another bedroom, which had meanwhile become vacant, was given to him, and his luggage was brought from the corridor into this room. The next morning the plaintiff discovered that his trinkets had been stolen from the drawer of the stand. He brought an action against the defendants for damages for the loss of the trinkets. There was no evidence to shew whether the trinkets were stolen while the stand was in the bedroom or after it had been placed in the corridor:—

Held (by Lord Esher, M.R., and Bowen, L.J.), that the plaintiff was received as a guest into the hotel, and that the relation of innkeeper and guest continued until a reasonable time after the plaintiff's goods had been placed in the

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corridor, and that, if the trinkets were stolen while the stand was in the bedroom, there was contributory negligence on the part of the plaintiff; but that, if they were stolen while the stand was in the corridor, the loss was due solely to the negligence of the defendants in placing it there:

But, *held*, that, inasmuch as it was not proved whether the trinkets were stolen in the bedroom or in the corridor, the defendants were, under s. 1 of the Act, liable up to the amount of 30*l.*, because they could not discharge the onus which lay on them of shewing that the plaintiff's negligence had contributed to the loss:

Held, also, that beyond the amount of the 30*l.* the defendants were not liable, because, for the same reason, the plaintiff could not discharge the onus which was cast upon him by s. 1 of shewing that the loss had occurred "through the wilful act, default or neglect" of the defendants:

Held, by Fry, L.J., that the plaintiff was not a guest in the hotel at the time when the loss occurred, and that, therefore, the defendants were not liable at all.

Decision of A. L. Smith, J., reversed.

THIS was an action against innkeepers for damages for the loss of trinkets belonging to the plaintiff—namely, a ring, valued at 35*l.*; diamond studs, valued at 15*l.*; a pearl breast-pin, valued at 30*l.*; and a diamond ring valued at 60*l.*—140*l.* in all, which were stolen whilst they were in the defendants' hotel. The following statement of the facts is taken from the written judgment of A. L. Smith, J., by whom the action was tried without a jury. On the night and morning of March 27 and 28, 1890, the plaintiff travelled to Liverpool to attend the Grand National Steeplechase, which was run on the latter day. He arrived by train timed to reach Liverpool at 6 A.M. on the morning of the 28th. Early on that morning he went to the defendants' hotel, having with him three articles of luggage—namely, a portmanteau, a hat-box, and a dressing-case bag. Upon his arrival at the hotel he asked for a bedroom. He was told by the manageress that the hotel was full, and that he could not have a bedroom, but that there was one room on the fourth floor then vacant—namely, No. 97, which was engaged by and retained for a lady and gentleman who were expected to arrive during that day, and that he could then utilize it for the purpose of washing and dressing. The plaintiff was thereupon shewn up to No. 97, and his luggage was also taken up into it by the hotel porter. There was posted up in the hall of the hotel a notice, pursuant to the Act 26 & 27 Vict. c. 41, and at the foot thereof

in leaded type was printed: "For the safe custody of money and valuables visitors are requested to apply at the office. By order." There was also hung up over the washing-stand in No. 97, a printed table of charges and regulations, amongst which was as follows: "The proprietors will not be responsible for property lost in the hotel unless the same be deposited at the office and a receipt taken (vide 26 & 27 Vict. c. 41, s. 1), and, as a matter of precaution, request that visitors will bolt and lock their room doors at night." There was also pasted upon the inside of the door of No. 97, just above the door handle, the following notice: "Visitors are respectfully requested to lock and bolt their doors before retiring." There was a key in the lock of the door, with a label attached with the number of the room thereon, so that the door could be locked and the key taken, had it been desired to do so. After arriving in No. 97 the plaintiff opened his dressing-case bag, and took thereout a stand, and placed it on the dressing-table. This stand contained a large number of silver-mounted bottles, a flask with brandy in it, and also ivory brushes, combs, boot and button-hooks, knives, scissors, and other implements for the toilet. In a drawer of this stand were the trinkets for the loss of which the action was brought. The plaintiff washed and dressed, and then went downstairs into the coffee-room and had breakfast, having left the room No. 97 unlocked, with the stand of his dressing-bag exposed upon the dressing-table as above described. He gave no information to any one of what he had done. Having paid for his breakfast, he went out, and did not return to the hotel till late at night on the same day. In the meantime—namely, about 9 P.M.—the lady and gentleman for whom No. 97 had been reserved arrived, and were shewn up thereto by the page-boy of the hotel. Upon going into the room the page-boy found the plaintiff's luggage situated as above mentioned, and whistled down the tube to the head porter for directions. No evidence was given to shew that the head porter, or any one else in the hall, was aware of the way in which the plaintiff had left his dressing-bag and its stand, or of its contents. The page-boy, pursuant to the order of the head porter, removed the luggage into the corridor, and there left the stand as it was, the dressing-bag, and the other luggage. At

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about half-past twelve at night the plaintiff, having shortly before returned to the hotel, asked for his room, but was told that he had none. It was ascertained, however, that a room upon the first floor had been vacated by a gentleman leaving by the night train, and this was given to the plaintiff. The plaintiff then entered his name in the guest-book, pursuant to the practice of the hotel when guests were received, and his luggage was brought down to the first floor from the corrider on the fourth. The next morning the plaintiff discovered that his trinkets had been stolen from the drawer of the dressing-bag stand, and the brandy in the flask was also partially abstracted. This action was thereupon brought.

A. L. SMITH, J. (after stating the facts as above, continued):—The first question is, whether the plaintiff was a guest in the defendants' hotel when the trinkets were stolen, or whether the liability of the defendants to him was that of bailees, either gratuitous or for reward, or what, if any, other relationship then existed between them. In my judgment, whatever the plaintiff's position may have been during the short period of time he was dressing and having breakfast, he was not a guest after he left in the morning to go to the races, and after which, as I infer, the trinkets were stolen. At any rate, there is no proof that they were stolen before he went to the races. He had been expressly told he could have no room; he was simply permitted to dress and breakfast; he signed no admission-book, which it was the practice for guests to do; he paid cash for what he had before leaving in the morning, upon the footing that he was not staying at the hotel, and this payment was entered in what was called the chance-book. In my judgment he was not a guest when his goods were stolen. This point is material, inasmuch as an innkeeper is primâ facie liable for his guest's goods, and the proof of loss of such goods whilst at an inn is primâ facie evidence of negligence on the part of the innkeeper or his servants. This presumption, which the law draws adversely to the innkeeper, is capable of rebuttal, as in the case of other presumptions, and one class of case in which it has been authoritatively held that the presumption is rebuttable is, where it is established that the loss

would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances, or, in other words, has been guilty of negligence which brought about the loss. This I understand to be settled law, affirmed and reaffirmed by the following cases: *Burgess* v. *Clements* (1); *Cashill* v. *Wright* (2); *Morgan* v. *Ravey* (3); *Oppenheim* v. *White Lion Hotel Company* (4); *Jones* v. *Jackson* (5); *Herbert* v. *Markwell.* (6) This presumption of liability does not exist in the case of a bailee, either gratuitous or for reward, and in each of such cases, in order to succeed, the plaintiff must prove affirmatively as a fact that the loss has been occasioned by reason of the bailee's neglect, and not merely that the goods have in fact been lost whilst in his custody. The question of the amount of negligence required to be established in the respective cases of bailees is immaterial here, for reasons hereafter appearing. Holding as I do that the plaintiff was not a guest when his trinkets were stolen, I next have to ascertain in what relationship the defendants stood to him when the theft took place. The plaintiff came with his luggage, and was allowed to dress and breakfast at the hotel, for which accommodation he paid, and then left the hotel, not having engaged a room. The defendants knew that he came with luggage, and it was by their servants taken up to No. 97 and unstrapped. No evidence was given that they thought it had been removed by the plaintiff, and, indeed, I apprehend that they thought nothing about it, and that the truth is that they forgot about it altogether; and the plaintiff on his part thought, that if he left it at the hotel, he would be taken in by the defendants upon his return from the races. Do these circumstances create a bailment? I am willing to decide this case upon the assumption that the defendants were bailees for reward of the plaintiff's goods when they were stolen, as I was invited to do by the plaintiff's counsel; but I am by no means certain that the assumption is correct. It seems to me extremely doubtful whether there was under the circumstances any bailment at all—i.e., a delivery of the luggage to the

(1) 4 M. & S. 306.
(2) 6 E. & B. 891.
(3) 6 H. & N. 265.
(4) Law Rep. 6 C. P. 515.
(5) 29 L. T. (N.S.) 399.
(6) 45 L. T. (N.S.) 649.

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defendants upon a condition; but, as it makes no difference in the result of my judgment, I will take it for this purpose most adversely to the defendants and in favour of the plaintiff, and assume that the defendants were bailees of the luggage for reward. In my judgment, as an innkeeper can get rid of the presumption of his liability by proof that the goods were lost by reason of the neglect of the guest, so does a bailee for reward avoid liability upon like facts being proved. In the case of a bailee for reward, the bailor has to prove, in order to render the bailee liable, actual negligence of the bailee which caused the loss, and if it be proved that the loss was occasioned by his own neglect, he has no case against the bailee. The bailee for reward is liable, because the loss has been occasioned by reason of his neglect, not because it has been brought about by the neglect of the bailor. By whose default, then, were these trinkets lost? The plaintiff left No. 97 open for any one to walk into at the time of a great race meeting, with his stand and the valuables thereon ready for any one to ransack. He takes no precautions as to securing their safety, although fully apprised by notices, if he chooses to read them, of the existence of danger. He leaves the hotel for the whole day without giving a word of warning to the hotel-keeper of the value or nature of the articles at risk, or of the unsecured condition in which he has left them. What is the result? In my judgment, the case established proves that the plaintiff's own neglect was that which occasioned the loss, if the fact be that they were stolen whilst in No. 97. But it was urged by the learned counsel for the plaintiff that it was the defendants' direct neglect which led to the loss, because they at 9 P.M. on the 28th placed the dressing-case, stand, and other luggage as it was in the corridor of the hotel, and that it was by the defendants' active neglect, as it was called, and not the plaintiff's, that the loss was occasioned. If the plaintiff had given evidence from which I could infer that the trinkets were stolen after the luggage had been removed by the defendants' servants into the corridor, I should have acceded to this argument; but where is the evidence of this? The plaintiff has wholly failed to give any such proof. Why am I to hold that the trinkets were stolen after the luggage was placed in the corridor, rather than that

they were stolen during the whole day of the 28th, whilst they were left by the plaintiff unprotected in No. 97? I cannot do so. The most that can be said is, that the proof given is equally consistent with the theft having taken place in the corridor after 9 P.M., as with its having taken place during the day in No. 97, though the abstraction of part of the brandy would tend somewhat to the conclusion that the thief had time for deliberation, and was not hampered by passers-by. There is no proof or presumption either way as to where the theft took place. How, then, has the plaintiff established that onus which is on him, that it was the defendants' default, and not his, which occasioned the loss? The proof given equally coincides with theft in either place; in the one place—i.e., in No. 97—the plaintiff, for reasons above stated, cannot recover, for it was caused by his own default; in the other—i.e., in the corridor—he can, for that was occasioned by the defendants' default. But in which was it? It was for the plaintiff to prove that the loss occurred at a time when the defendants were liable. He has failed to do so, and consequently I give judgment for the defendants, and with costs.

The plaintiff appealed.

Feb. 6. *Henn Collins, Q.C.*, and *Commins*, for the plaintiff. The learned judge was in error in finding that the plaintiff was not a guest in the hotel at the time when his goods were lost. But that may not be very material, for it is sufficient if he were a guest at the time when his luggage was received by the defendants. According to the plaintiff's evidence the bedroom No. 97 was given to him unconditionally.

If the relation of host and guest once exists, the responsibility for the safe custody of the property of the guest is thrown upon the innkeeper, unless there has been a want of reasonable care on the part of the guest: *Bennett* v. *Mellor* (1); *Cashill* v. *Wright* (2); *Morgan* v. *Ravey* (3); *Day* v. *Bather* (4). In the absence of any alteration in the relation of the parties, that of innkeeper and guest must be presumed to continue: *Allen* v. *Smith.* (5)

(1) 5 T. R. 273.
(2) 6 E. & B. 891.
(3) 6 H. & N. 265.
(4) 2 H. & C. 14.
(5) 12 C. B. (N.S.) 638.

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Kennedy, Q.C., and *W. F. Taylor*, for the defendants. The plaintiff was a guest in the hotel only for a limited period, i.e., during the time for which he was originally accepted as a guest by the manager. After he had left the room, he was no longer a guest. He was told that he could occupy the bedroom, but only until the gentleman and lady who had engaged it should arrive. Several of the cases which have been cited for the plaintiff are cases in which a horse had been left in the stable of an inn. In such a case the innkeeper would derive a profit from the feeding of the horse, and would have a lien on the horse for the cost of feeding it, and there would be an inference that the owner of the horse was still a guest. But there is no such inference when luggage is left behind in an inn. The innkeeper can derive no profit from keeping the goods: *Gelley* v. *Clerk* (1); Bacon's Abridgment, 7th ed. vol. iv., p. 448; *Yorke* v. *Grenaugh* (2). In *Bennett* v. *Mellor* (3), the plaintiff's goods were stolen while his servant was sitting in the inn as a guest. In the present case the contract between the plaintiff and the defendants was a special one. The going away of the guest is one of the incidents which must be taken into consideration: Comyns' Digest, 5th ed. vol. i. p. 412; Story on Bailments, 9th ed. §§ 478, 479. There was contributory negligence on the part of the plaintiff.

As regards the Act 26 & 27 Vict. c. 41, which by s. 1 limits the liability of the innkeeper to the sum of 30*l.*, except where the property shall have been stolen, lost, or injured, "through the wilful act, default or neglect" of the innkeeper or his servants, if the plaintiff seeks to recover more than 30*l.* he is bound to shew that there was a "wilful act, default or neglect" on the part of the defendants: *Spicer* v. *Bacon.* (4) The onus of proof is on the plaintiff. He must also prove that the negligence of the defendants caused the loss; not merely that it might have caused it, but that nothing else could have caused it. Here the loss might equally well have been caused by the plaintiff's own previous negligence in leaving his jewel-case open in the room.

Henn Collins, in reply. The relation of host and guest existed,

(1) Cro. Jac. 188.
(2) 2 Ld. Raym. 866.
(3) 5 T. R. 273.
(4) Law Rep. 2 Ex. 463.

as the learned judge found, at one time, and the only question is, when did that relation come to an end? The determination of the defendants to put an end to it was held in abeyance, until it should be seen whether the plaintiff could have the bedroom for the night. If the relation continued until the plaintiff's goods were put out into the corridor, what is the legal result? The Act leaves the common law liability of an innkeeper unaltered as regards a value less than 30*l.* To that extent the innkeeper is liable, unless he can prove that the loss was caused by negligence on the part of the guest, and the onus of proving this is upon the innkeeper. The defendants have not discharged that onus. As regards any value beyond 30*l.*, the onus is upon the guest to prove that the loss was occasioned by the wilful act, default or neglect of the innkeeper. The plaintiff has proved this. He intrusted his property to the defendants, and when he resumed possession of it he found that his valuables were lost. Up to the time at which the defendants put the plaintiff's goods out into the corridor, there was a presumption of law in their favour: *Williams* v. *East India Co.* (1) But the putting the goods out into the corridor was an act of negligence of the defendants' servants, and by proving that act the plaintiff has discharged the onus which was upon him.

LORD ESHER, M.R. The solution of this case to my mind depends upon the inference of fact which we ought to draw from the evidence which was given, and from matters of which there can be no doubt whatever. It does not appear that there is any question of the credibility of the witnesses. We are to take the facts as they are stated by the learned judge, and, acting as a jury to draw from them an inference of fact, and in so doing we must bring into play our knowledge of the world. The plaintiff went to this hotel at Liverpool. He did not go there with the intention of asking the hotel-keeper to enter into a special contract with him, but he went there in the exercise of his right to do so as one of the public. An hotel-keeper by opening his house as an hotel offers it to the use of the public as such, and thereupon the common law of England imposes on him certain

(1) 3 East, 192.

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duties, and gives him certain rights. He has no right to refuse to take into his house any one of the public who offers himself as a guest, if he has room for him in his house; and, in return for this obligation which it imposes on him, the common law gives him a lien for his charges upon the goods of the guest which are in the house. If the innkeeper has no room in his house, then he is not bound to take in any person who offers himself as a guest. The plaintiff went to the defendants' hotel and proposed to be a guest there according to the provisions of the common law, and subject to the obligations resulting therefrom. When he arrived there he was told by the manager, "We cannot give you a bedroom; we have none to give you." But after a moment's reflection she came to the conclusion that she could give him a room to use temporarily for the purpose of washing and dressing. It cannot, however, be contended that he was only to wash and dress in the room; he was to have the use of the room until the persons by whom it had been engaged should arrive. Then he asked the porter to take his luggage up to the room, and this was done. The result was this—the defendants gave him the room in the character of innkeepers, but they told him that he could have the use of it only up to a certain time. There was no special contract that he should have the use of the room in some other character than that of guest; he was to have the use of the room as a guest; but the defendants told him that he could not have it beyond a certain time. They had received a telegram asking them to retain the room for a lady and gentleman, who were expected to arrive in the course of the day, and they had not yet arrived. If these persons had not arrived, the defendants would have left the plaintiff in the occupation of the room. They gave him the room in the ordinary way as a guest; but they told him that he would have to surrender it, if and when the other people, who were expected, should arrive. The conduct of both parties is consistent with this view of what took place. What could the relation between them have been but that of innkeeper and guest, though it was to continue only until the arrival of the other persons who had engaged the room? It has been contended that the contract with the plaintiff was only, that he should have the use of the room while he was washing and

dressing, and that it was at an end as soon as he had finished washing and dressing, and that he was told so by the manageress. But, even if the contract did come to an end then, what would have been the duty of the defendants? Is it the ordinary custom when a guest arrives at or quits an hotel that he should carry his own luggage up to or down from his room? Certainly not. The custom is for the servants of the hotel-keeper to carry the luggage. So that, if the defendants' contract with the plaintiff was at an end, the manageress ought to have sent the hotel porter to carry down the plaintiff's luggage. It is said that the plaintiff ought to have given notice to the manageress when he had finished dressing. Why should he do so? If she knew when the contract was at an end, why should she be told by the plaintiff? I cannot feel any doubt that, in the ordinary course of things, if the manageress intended that the plaintiff should occupy the room only for the particular period while he was washing and dressing, it would have been her duty to tell the porter as soon as the occupation was at an end to move the plaintiff's luggage downstairs. As soon as the plaintiff himself came down, the manageress must have known that he had finished dressing, and therefore it would have been her duty to send the porter up to fetch the plaintiff's luggage down. But, to my mind, so long as she chose to leave the plaintiff's luggage in the room, she did so on the footing that the room was still in the plaintiff's occupation. From first to last there was no special contract; there was nothing but the ordinary relation of innkeeper and guest, though it was to continue for a specified time only, or rather for an indefinite time. At any rate, the plaintiff was a guest in the hotel up to the time when his luggage was put out of the bedroom into the corridor by the defendants' servants. Then the defendants were bound to keep the plaintiff's things safely, and this is conclusive of the defendants' liability for the loss, unless they can shew that the negligence of the owner of the goods conduced to the loss. The defendants must shew two things, (1.) that the plaintiff was guilty of negligence, and (2.) that his negligence conduced to the loss. The defendants have shewn that the plaintiff was guilty of negligence. It was a careless act to leave his jewellery in the room out of the dressing-bag, and,

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if the loss had been occasioned by a thief going into the room and stealing it, or by one of the servants of the hotel taking it out of the room, the defendants would have discharged the onus which lay on them by proving both the things which it was necessary for them to prove. If the plaintiff's goods had never been moved out of the room by the defendants, the jewellery must have been stolen while it was in the room, and then the fair inference would have been that the plaintiff's own negligence had contributed to the loss. But, by turning the plaintiff's things out into the corridor, the defendants cut themselves off from the possibility of proving this, and thus rebutting the plaintiff's primâ facie case. When the people who had engaged the room arrived, the manageress must have inquired whether it was ready for them. The page-boy, who was sent to see, found that the room was not ready, and that the plaintiff's things were in it. He very properly telephoned to the head porter to say what was to be done, and the head porter replied, "Put the things out in the corridor." Why did he not say, "Bring them down to me"? The head porter was clearly in fault. The boy accordingly put the plaintiff's things, just as they were, out in the corridor. I cannot have the smallest doubt that this was an act of negligence, and gross negligence. The plaintiff's things, however, were put out in the corridor, and left there, and thus the defendants have precluded themselves from proving that the jewellery was stolen while it was in the room. It is just as likely that it was stolen while it was in the corridor. It comes, therefore, to this—there was contributory negligence on the part of the plaintiff while the goods were in the room; but, when the defendants' servants went into the room and became aware of the plaintiff's negligence, they were bound to take reasonable care of his property. When they saw the negligence of the plaintiff, they ought to have taken care not to be negligent themselves. If the jewellery was stolen while it was in the corridor, it was stolen not in consequence of the plaintiff's negligence, but by reason of the defendants' negligence. The defendants have not discharged the onus that lay upon them, because they have not proved that the loss was occasioned by the negligence of the plaintiff. If, then, the statute had not been passed, the defend-

ants would be liable to make good the whole of the loss. The statute leaves the rights and obligations of an innkeeper and his guest just as they were before, save that it provides that the innkeeper shall not be liable to make good to his guest any loss of property brought to his inn to a greater amount than the sum of 30*l.*, except (inter alia) when the property shall have been lost "through the wilful act, default or neglect of such innkeeper, or any servant in his employ." The plaintiff in an action against an innkeeper for the loss of his goods can recover only 30*l.*, unless he can shew that the loss was the result of the wilful act, default, or neglect of the defendant or his servant. The Act gives protection to the innkeeper beyond the sum of 30*l.*, unless one of these things is proved by the person who seeks to recover more than 30*l.* And he must prove that the loss resulted from that wilful act, default, or neglect alone; if he himself contributed to the loss by his own negligence, the loss was not the result of the innkeeper's negligence alone. The plaintiff must shew that the loss occurred without any contributory negligence of his own. If the loss occurred while the goods were in the bedroom, I fail to see that there was any negligence of the defendants' servants, and the plaintiff would not be able to make out his case. If, on the other hand, the loss took place while the goods were in the corridor, the plaintiff would be able to make out his case, for then the loss would have resulted solely from the negligence of the defendants' servants. But the burden of proof lies on the plaintiff, and he is unable to prove when the loss took place—when the goods were in the room or when they were in the corridor—and therefore he fails to discharge the burden. He fails, just as the defendants failed to discharge their burden, and he cannot recover more than 30*l.* Judgment must be entered for the plaintiff for 30*l.*

BOWEN, L.J. The result of this appeal depends entirely upon our drawing a correct inference of fact as to one small point. It nevertheless is a very curious case and very interesting to a lawyer, because it is an instance of a decision depending ultimately upon the onus of proof; and the shifting of that onus; and this depends upon the drawing of a right inference of fact.

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It is by no means a nonsensical or fanciful thing that a case of this kind should have to be decided by the shifting of the onus of proof. If the plaintiff can once bring himself within the class of cases in which the relation of innkeeper and guest is created, and can shew that the landlord took possession of his goods as innkeeper, it would then lie upon the landlord to discharge himself from liability. During the whole of the day these goods were in the hotel, and the difficulty arises from this, that during that period they were turned out of the room in which they were lying. If the goods were lost after this happened, they must have been lost by reason of the direct negligence of the servants of the hotel in turning them out of the room; whereas, if the loss occurred before it happened, and whilst the plaintiff's luggage was in the room from which it was afterwards excluded, in all probability, although there may have been negligence on the part of the hotel servants, there was such negligence on the part of the plaintiff also in leaving them exposed as would prevent his recovering the value of the goods from the defendants. Were, then, these goods lost before the luggage was turned out into the corridor by the hotel servants, or were they lost afterwards? We do not know. Upon whom does the onus of proof rest?

This, as it seems to me, depends entirely upon the answer which ought to be given to this question. Did the relation of host and guest continue after the plaintiff left the hotel in the morning, or did it not? If the relation of host and guest had not ceased, the innkeeper, in order to discharge himself from liability, would have to shew that the loss happened, not after the luggage had been turned out into the corridor, which was such an act of negligence on his part that he could not excuse himself for it on the ground of any contributory negligence in the plaintiff, but while the luggage was in the room, in which case he would be able to allege as an excuse that the loss may have been caused by the plaintiff's leaving his goods about the room in such an unsafe position. If the innkeeper has to discharge himself of this burden he cannot do it, so that he would fail. In this way it is that the whole case comes to turn on this question, Was the relation of host and guest ever created, and, if so, when did it cease?

In my opinion, the case is not to be decided purely by a grammatical construction of the expressions which were used in the bar of the hotel when the plaintiff arrived there in the early morning. We must read those expressions by the light of the ordinary mode of conducting the business of an hotel. We start with this, that a man who comes to an hotel, if there is an unoccupied room, has a right to use that room. If indeed the room has been engaged beforehand by some one else, it may be that, when the hirer of the room arrives, or for a reasonable time before his arrival, the hotel-keeper is entitled to resume possession of the room, in order that he may prepare it and deliver it to the hirer on his coming. I will assume that. But, until the room is wanted for the new guest, it seems to me that, according to the common law and custom of the realm, the innkeeper is bound to afford accommodation to any one who offers himself as a guest. He has no right to be like the dog in the manger and say, "I shall want the room for another person this day week, and therefore I will not let it to you to-day." Until it is wanted by those who have acquired a right to occupy it, an arriving guest is entitled to find accommodation in it. Therefore the plaintiff, when he arrived in the morning, had a right to such accommodation in that room, which was then empty, as could be furnished to him consistently with the engagement which the hotel-keeper had made with the persons who were to have the use of it in the course of that day or the following day. The plaintiff was, therefore, properly warned that a lady and gentleman were coming in the course of the day, to whom, when they should come, he would have to surrender the room. He was told that he might go upstairs for the purpose of washing and dressing, and considering his rights as one of the public and what a man arriving at an hotel would expect, and taking into account the hotel-keeper's understanding of the way in which to conduct the business of his hotel, I think the words used would be understood on both sides to mean, "We cannot guarantee you the room for more than the purpose of washing and dressing, and we might at any moment have to turn you out; but, on the other hand, you may go on using the room until the persons who have engaged it arrive, or until the time comes for

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making preparations for them." I think that is the true inference to be drawn as to the terms upon which the plaintiff went upstairs, and all the facts of the case seem to me to bear out that view. All his luggage was taken up to the room. He dressed in the room, and then he went down and had his breakfast. It is true that no hotel bill was made out for him in the form in which such bills are usually made out for persons occupying rooms in an hotel, nor was his name entered in the admission-book. But that is explained by the fact that it was not at all certain that he would occupy the room for the night, and accordingly he paid for his breakfast as soon as he had it. I should not draw from these facts the conclusion that, if the innkeeper had chosen to demand payment for the use of the room, the demand could not legally have been enforced. On the contrary, I think that, as soon as he had taken the plaintiff's luggage up to the room, and had placed it in the room, the innkeeper became entitled to charge the plaintiff for the use of the room—a charge which would be expanded or contracted, according as the plaintiff's occupation of the room was prolonged or not.

The plaintiff came downstairs, and left the hotel to go to the races. He made no payment to the servants; he made no payment at all except for his breakfast, and he left his luggage in the room; and, although it may be that as the day went on it escaped the memory of the hotel manager and his servants that the plaintiff's luggage was left in the room, they must have known, at all events, in the morning that it had not been brought down. What is the true inference from all this? I will put aside entirely what happened when the plaintiff returned at night, because it may be he was then interested in making out his claim to the room; and, therefore, we must discount his conduct then. I will look only at his conduct in the morning; and the inference I draw from it is this, that he went upstairs on the terms that he could only rely upon having the room for his dressing and washing, but that he might continue to occupy it until the people who had engaged it should arrive, and he should be thereupon turned out. But, at all events, it is said, when his luggage was turned out the relation of host and guest was

brought to an end, and the onus of proof of liability for the loss shifted at the very moment when the goods were put out into the corridor. That, to my mind, is not a true view of the law. I think the relation of host and guest cannot be terminated abruptly and without notice to the guest. A reasonable time must be allowed for him to carry away or secure his effects; and I think that in the present case the relation of host and guest between the defendants and the plaintiff, and the legal liability of the defendants, continued until a reasonable time after a demand for the room had been made by the persons who had engaged it, and that the defendants had no right the moment they wanted the room to eject the goods into the corridor, and leave them unguarded there, without any notice to the plaintiff. The relation of host and guest having continued, therefore, down to the time when the goods were placed in the corridor, the burden of excusing the loss rests on the defendants.

The defendants have not succeeded in discharging that burden which rests upon them; and, consequently, the lost goods must be paid for by them, but only up to the limit of 30*l.*, for the reasons which the Master of the Rolls has already given.

FRY, L.J. With regard to the manner in which the onus of proof shifts—whatever may be the true inference to be drawn from the facts—I entirely agree with what has been said by my learned brethren. But upon the question, what is the true inference to be drawn from the facts, I have the misfortune to differ from them, and I agree with the learned judge who tried the case; and, although in that state of things my opinion is of no importance, still it is none the less my duty to state my reasons for it, and I will do so as shortly as I can.

I think the learned judge considered the evidence of the defendants to be trustworthy, and the conclusion at which he arrived with regard to the facts is this: that the plaintiff, upon his arrival at the hotel, asked for a bedroom, that he was told by the manageress that the hotel was full, and that he could not have a bedroom, but that there was one room on the fourth floor, No. 97, then vacant, which had been engaged by a lady and gentleman, who were expected to arrive in the course of the day,

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and that the plaintiff could make use of the room for the purpose of washing and dressing. It is possible, I think, notwithstanding that, that the plaintiff might have insisted on hiring the room during the day. But we all know that the usual practice is to engage a bedroom in an hotel for the night, not for the day; and that, although, no doubt, the hiring of a room for part of a day is an engagement which may sometimes be entered into, it is not usual. According to the ordinary mode in which the business of an hotel is conducted, you would not expect such an arrangement to be made.

I think, therefore, that it was quite right for the manageress to tell the plaintiff, if it was true, as it appears to have been, that he could not have the room for that night; and that, therefore, she could not allow him to engage the room in the ordinary mode in which bedrooms at an hotel are engaged. I will say nothing as to what his rights might have been, if he had insisted that he was entitled to the use of the room until the arrival of the persons who had engaged it; because, as it seems to me, he did not so insist, but he accepted the view which she presented to him, and which left him free to go to any other hotel and obtain accommodation there for the night. He came in after a night's journey; he was desirous of washing and dressing, and having his breakfast; and to that extent, and no further, the manageress offered him accommodation in the hotel. To that extent, and no further, he accepted the accommodation. What was done then? His luggage was sent up to the room by the hotel porter. That was necessary, or, at any rate, convenient, for the purpose for which he was temporarily to occupy the room. He could not conveniently wash and dress without opening some of his luggage, and it was natural that the whole of the luggage should be sent up. It is much more convenient to keep all your luggage together, even though you do not require to use it all. Accordingly, the plaintiff occupied the room for the purpose of washing and dressing. When he had finished he came down to breakfast; he went to the breakfast-room, and there he had his breakfast. His breakfast was not booked to him, as it would be to an ordinary guest who was staying in the hotel; and it is to be observed that the plaintiff is not a stranger to this hotel; it appears that

he has been in the habit of going there before, and knows the ways and customs of the hotel. Accordingly, he paid for his breakfast then and there, which is not the ordinary course when a person is expected to remain as a guest in an hotel for some length of time. Moreover, he did not receive the ordinary ticket, which, it appears, according to the custom of this hotel, is given to persons who have engaged bedrooms. Therefore, I cannot but think that the manageress intended that the plaintiff should only use the room for the limited time and purpose which I have mentioned, and that he acceded to that arrangement, and did not engage the room for the day, and could not, therefore, be charged for it as engaged for the day. Whether a slight charge would be made for the occupation of the room during the half-hour or so for which he was to have it, it is not necessary to consider. Then, after he had his breakfast, the plaintiff went away. What ought he to have done under the circumstances? Assuming the bargain, or the relation between him and the defendants, to have been that which I think it was, his reasonable and proper course would have been to pack up his things, and, when he had finished using the room for the purposes for which he required it, or within a reasonable time afterwards, he ought to have informed the porter that his luggage was ready and that he desired to have it brought downstairs, either that it might be taken out of the hotel, or that something else might be done with it. He ought to have made some provision for his luggage. It is said that the fact that the people of the hotel did not interfere with his luggage shews that he had been accepted as the occupant of the room during the day. I do not think it does. We all know that in the ordinary course of things, the servants of an hotel do not interfere with your luggage until you tell them it is ready; and, therefore, I think that the manageress of the hotel might reasonably expect that the plaintiff, having acceded to the limited engagement of the room which she was willing to offer him, would give the requisite information to the porter as to the disposal of his luggage. If he did not do that, he omitted to do it at his own risk.

In my opinion, the true inference from the facts is this: the plaintiff engaged the room merely for the purpose of washing and

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dressing; he did not insist upon any further right. He could not have been charged for any further occupation. He was not a guest in the hotel after he had washed and dressed, and had had his breakfast, and he only left his property in the hotel in the expectation that by so doing he might have a preferential claim to the occupancy of some other room.

It is suggested that he was entitled to occupy the room down to the time of the arrival of the other expected guests. Assume that he was. He did not attempt any such occupation. If he had, he would have made some inquiry with regard to the time when those guests were expected. It must be taken that he knew he was going to be out for the greater part of the day, and yet he made no such inquiry. He did not ask when the persons who had engaged the room were expected; he did not leave his things packed so that they could be safely moved when those persons should arrive. It seems to me, therefore, that the conclusion that the plaintiff was to occupy the room for an unascertained time—until the arrival of the lady and gentleman who had acquired a prior right to it—is not consistent with the facts.

In my judgment, the learned judge ruled rightly. I need not say that, as the Master of the Rolls and Bowen, L.J., take a contrary view, I differ from them with great diffidence.

Appeal allowed.

Solicitors: *F. Venn & Co., agents for H. Quinn, Liverpool; Roche & Son, agents for Snowball & Lewis, Liverpool.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Jan. 20;
April 17;
May 5

JOYNER *v.* WEEKS.

Landlord and Tenant—Lease—Breach of Covenant to deliver up Premises in Repair—Measure of Damages.

The general rule with regard to the measure of damages in an action for breach of a covenant by a lessee to deliver up the demised premises in repair is that such damages are the cost of putting the premises into the state of repair required by the covenant.

Such measure of damages is not affected by the fact that, by reason of the terms of a lease granted by the lessor to another lessee from the expiration of the defendant's term, the lessor is at the time of action brought no worse off than he would have been if the defendant's covenant had been performed.

ACTION for damages for breach of covenant by the lessee of a house to keep it in repair and deliver it up in repair.

The cause was referred for trial to an official referee, who was to direct judgment to be entered and otherwise to deal with the whole action, pursuant to Order XXXVI. The following statement of the facts is taken from the judgment of the official referee, and was adopted in the judgment of the Divisional Court.

"This is an action by the survivor of three lessors of a house No. 10, Holborn Bars, against the lessee for damages for breach of a covenant to surrender at the expiration of his lease (which was dated November 10, 1868, and expired March 25, 1889), well and sufficiently repaired in accordance with the terms of the lease. The cost of making good the dilapidations was proved before me to be 70*l.*; the plaintiff's counsel claimed as damages for the breach of covenant the whole amount of this cost. The defendant, without admitting liability, had paid into court 45*l.*; but his counsel contended that under the circumstances which I am about to state I ought to give nominal damages only.

"On May 20, 1887, the plaintiff, together with several other persons beneficially interested in the reversion, executed a lease of the house No. 10, to Samuel Lewis, who was the tenant of Nos. 9 and 11, which were subject to the same trusts as No. 10; this lease was for a term of twenty-one years, to commence on March 25, 1889, when the defendant's lease of No. 10 would

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expire. The rent was 300*l.* (1), and Lewis covenanted to lay out 200*l.* in making alterations to No. 10 and the adjoining houses Nos. 9 and 11, for the purpose of establishing communication between them. He also covenanted to keep the premises in repair. The defendant had carried on a millinery business at No. 10, and Lewis a draper's business at Nos. 9 and 11, and the object was to throw the three ground floors into one shop for Lewis's business. Immediately after the expiration of the defendant's lease Lewis made the alterations, and in the course of them demolished some parts of No. 10, which were out of repair; other parts of No. 10 were also out of repair, and the cost of putting them into repair would have been 45*l.* Lewis had made no claim to be reimbursed the cost to which he was put in repairing, and on the terms of his lease it was clear that he had no right to make any such claim.

"For the defendant it was urged that the plaintiff had suffered no loss by the breach of the covenant, and therefore ought not to have more than nominal damages. As a matter of fact, the plaintiff had suffered no loss, and never could have suffered any loss except in the possible contingency of a failure by Lewis to perform the covenants in his lease, and a consequent determination thereof. Nothing of this kind in fact happened, and it was not suggested that even if Lewis had to be evicted there would be found still remaining any of the dilapidations which the defendant had left."

The official referee gave judgment for the plaintiff for one farthing, and ordered him to pay to the defendant the whole costs of the action. The plaintiff moved to set aside the judgment, and enter judgment for the plaintiff, or for a new trial, on the ground that it was wrong in law, in that it was based upon an agreement made between the plaintiff and a third party, which was improperly admitted as evidence in favour of defendant; and that the proper measure of damages was not one farthing, but such a sum as was reasonably necessary to put the premises in the state of repair in which the defendant ought to have left them.

(1) It appeared in the course of the argument in the Court of Appeal that this was a larger rent than that reserved in the lease to the defendant.

Lumley Smith, Q.C., and *Cecil Chapman*, for the plaintiff.
Jelf, Q.C., and *W. H. Clay*, for the defendant. (1)

Cur. adv. vult.

April 17. The judgment of the Court (Wills and Wright, JJ.) was read by

WRIGHT, J. [The learned judge stated the facts as above, and proceeded:—] The first question which arises on the judgment of the learned referee is whether he was right in awarding one farthing as damages, on the ground that the plaintiff had sustained no loss. We do not understand the finding to be to the effect that the house was at the end of the term substantially as valuable to occupy, sell, or let in its then actual state as it would have been if the covenant had been duly performed. What the effect of such a finding would have been must be considered later on. The finding appears to be at least consistent with the view that the house was substantially less valuable to occupy, sell, or let by reason of the non-repair; and in substance to amount to no more than this, that the plaintiff had before the end of the defendant's tenancy happened to find another tenant who for reasons of his own was content to give as much for the house as he would have given if it had been properly repaired. If this is the correct view of the judgment, we think that the finding that the plaintiff has sustained no loss is based upon an erroneous view of the law. The breach of contract and a consequent diminution of the value of the plaintiff's interest in the house, apart from any special circumstances connected with the new lease, being supposed, the suggested kind of ademption of loss appears to us to be too remote, uncertain, and accidental to be properly made the ground of decision.

Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed. Charity, insurance, an alteration of market values, may have recouped or nullified his loss. Or it

(1) It has not been thought necessary to report the arguments both in the Divisional Court and the Court of Appeal.

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may be proved that the plaintiff, if he acted as a prudent man in his own interest, would, at the end of the defendant's term, have pulled down the house, even though duly repaired, and built a different kind of structure, so that the repairs if done would have been of no value; but he chooses to relet the house in its existing state. In such a case it could hardly be contended that he might not recover substantial damages. The person whose breach of contract has caused damage is not the less liable because the damage has been made good, or its effect compensated by an extraneous event of such a kind that if it had operated the other way it would not have increased his legal liability. Nor does it seem to us that the relation between the plaintiff and the defendant is directly, if at all, affected by the terms of an agreement made by the plaintiff with a third person before the expiration of the defendant's term. That agreement might be rescinded, or might never be performed. When it was made the parties to it could not foresee, and did not contract on the basis, that there would at the end of the defendant's term be any breach of the contract to deliver up in repair. It must be not the making but the performance of the new agreement to which the supposed effect would be attributable. But if so, then at the moment of the termination of the defendant's tenancy, and before the new agreement was performed, a cause of action vested in the plaintiff against the defendant, and this could not be taken away or affected by the subsequent res inter alios acta.

Such authorities as are to be found appear to be consistent with this view. *Colley* v. *Streeton* (1823) (1), *Oldershaw* v. *Holt* (1840) (2), and *Davies* v. *Underwood* (1857) (3), may be referred to; but they throw little, if any, light on the matter. In *Rawlings* v. *Morgan* (1865) (4) the point came near to being, but was not, decided. There, before the end of a lessee's term, his lessor had verbally agreed to give a building lease to a new tenant, who in fact entered on the expiration of the first term and pulled down the premises, and afterwards (but apparently before the action) obtained a building lease in conformity with the verbal agreement. The dilapidations were 22*l.*; but the

(1) 2 B. & C. 273.
(2) 12 A. & E. 500.
(3) 2 H. & N. 570.
(4) 18 C. B. (N.S.) 776.

terms of the building lease were not affected by the existence of the dilapidations. The lessor sued the first lessee for the 22*l.*, and was allowed to recover the full amount. The argument was the same as in the present case, that the plaintiff had in fact sustained no loss. Erle, C.J., and Keating, J., declined to say what their opinion would have been if during the defendant's term the plaintiff had made a binding agreement with the new tenant; Byles, J., relied exclusively on the fact that before any binding agreement had been made with a new tenant a cause of action for the 22*l.* had accrued. Montague Smith, J., doubted whether such a binding agreement would have in any way affected the plaintiff's right as against the defendant. In *Inderwick* v. *Leech* (1884) (1), the lessor, at the end of the term and before action, pulled down the house; but Lopes, J., at Nisi Prius, and Lord Coleridge, C.J., and Cave, J., in the Divisional Court, held him entitled to recover the sum which would have been the cost of repair. Lastly, in *Morgan* v. *Hardy* (1886) (2), which was reversed on appeal on another point, but not appealed on this point, Denman, J., came to a similar conclusion, although it appeared that, owing to a change in the character of the neighbourhood, the house was as valuable at the end of the term without some of the repairs as it would have been if they had been done. We think, therefore, that both on principle and on the authorities the ground on which the official referee limited the damages to a farthing is not tenable.

It does not however follow either that judgment can be entered for the 70*l.*, or that on other grounds the official referee could not properly have given nominal damages only, and it is necessary to endeavour to ascertain what is the proper rule for ascertaining the measure of damages in cases of this kind, extraneous agreements or matters being put aside. Considering the frequency with which this question must arise, the absence of clear and decisive authority is not a little remarkable.

Where a tenant covenants to repair during the term, and the action is brought during the term, the lessor, if he has reserved to himself a sufficient power of entry and has done the repairs, may of course recover the cost. If he has not reserved such

(1) 1 Times L. R. 95, 484. (2) 17 Q. B. D. 770.

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power, and if no measure of damages is fixed by his own liability to a superior lessor, Lord Holt is said to have held, in *Vivian* v. *Champion* (1705) (1), that the lessor ought to recover the sum which the repairs would cost. Lord Cranworth on the other hand (when Baron Rolfe) held, in *Marriott* v. *Cotton* (1848) (2), that the damages should be only nominal. *Marriott* v. *Cotton* (1848) (2) is stated to have been reversed: see *Bell* v. *Hayden* (1859) (3). Both these decisions have been repeatedly questioned so far as they might be regarded as laying down any general rule; and it seems to be now settled that in such cases the jury on the one hand are not bound to give the cost of repairing, and on the other hand are not limited to nominal damages even where the length of the term unexpired is so great that no real damage can be proved or the accumulated proceeds of investment of a nominal sum would at the end of the term provide more than a sufficient fund: see *Doe* v. *Rowlands* (1841) (4); *Turner* v. *Lamb* (1845) (5); *Macnamara* v. *Vincent* (1852) (6); *Smith* v. *Peat* (1853) (7); *Bell* v. *Hayden* (1859) (3); *Mills* v. *East London Union* (1872) (8); *Beattie* v. *Quirey* (1876) (9); *Metge* v. *Kavanagh* (1877) (10). There is in these cases the less probability of injustice to the lessor in leaving the jury somewhat at large, because the lessor can bring repeated actions.

But where, as in the present case, the term has expired and damages must be recovered once for all, the necessity of a more certain rule is apparent. Two measures have been suggested, the first the amount of money which it will cost the lessor to do the repairs, with some allowance for loss of rent or occupation during the time of reparation and with some deduction where proper by reason of substitution of new for old; the second, the diminution of the value of the lessor's estate by reason of the non-repair. In general they will both come to the same thing, and it can seldom be the case that the diminution in value can be more than the cost of repair. It may, how-

(1) 2 Ld. Raym. 1125; 1 Salk. 141.
(2) 2 C. & K. 553.
(3) 9 Ir. C. L. Rep. 301.
(4) 9 C. & P. 734.
(5) 14 M. & W. 412.
(6) 2 Ir. Ch. Rep. 481.
(7) 9 Ex. 161.
(8) Law Rep. 8 C. P. 79.
(9) Ir. Rep. 10 C. L. 516.
(10) Ir. Rep. 11 C. L. 431.

ever, often be the case that the diminution in value by reason of some or all of the tenant's defaults is much less than the cost of making them good. A part of the structure may have been designed for a purpose which has become obsolete, or a building may for many reasons be found at the end of a term to be as valuable, or nearly as valuable, in a partially as in a completely repaired state. In such cases, which measure is to be preferred? The former, the cost of repairing, is adopted with more or less positiveness in the following cases: *Vivian* v. *Champion* (1705) (1), an action during the term; *Davies* v. *Underwood* (1857) (2), per Watson, B.; *Rawlings* v. *Morgan* (1865) (3), per Montague Smith, J.; *Woodhouse* v. *Walker* (1880) (4), per Lush, J.; *Morgan* v. *Hardy* (1886) (5), not reversed on this point: *Nixon* v. *Denham* (6); *Metge* v. *Kavanagh* (1877) (7). The latter (the diminution in value) is supported in the following: *Colley* v. *Streeton* (1823) (8), an action during the term; *Doe* v. *Rowlands* (1841) (9), an action during the term; *Turner* v. *Lamb* (1845) (10), an action during the term; *Smith* v. *Peat* (1853) (11); *Davies* v. *Underwood* (1857) (2), per Bramwell, B.; *Rawlings* v. *Morgan* (1865) (3), per Erle, C.J.; *Mills* v. *East London Union* (1872) (12), an action during the term; *Beattie* v. *Quirey* (1876) (13); *Lombard* v. *Kennedy* (1888) (14). In *Inderwick* v. *Leech* (1884) (15), the two measures seem to be regarded as identical.

It appears to us that the better measure is the amount of the diminution of value, but not exceeding the cost of doing the repairs (with the addition or deduction as above suggested), and that in the cases which appear to adopt the other test it was not intended to decide that the cost of repairing ought to be or can properly be given so far as it exceeds the diminution of value. To give that excess might in effect be to give an unfair kind of

(1) 2 Ld. Raym 1125; 1 Salk. 141.
(2) 2 H. & N. 570.
(3) 18 C. B. (N.S.) 776.
(4) 5 Q. B. D. 404.
(5) 17 Q. B. D. 770.
(6) 1 Ir. L. R. 100.
(7) 11 Ir. Rep. C. L. 431.
(8) 2 B. & C. 273.
(9) 9 C. & P. 734.
(10) 14 M. & W. 412.
(11) 9 Ex. 161.
(12) Law Rep. 8 C. P. 79.
(13) Ir. Rep. 10 C. L. 516.
(14) 23 Law Rep. (Ir.) Ch. 1.
(15) 1 Times L. R. 95, 484.

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specific performance to the great detriment of the lessee without any advantage to the lessor as such; whereas the proper function of a right of action for damages for breach of contract seems to be to make good to the aggrieved party the damages which he has actually sustained: see *Robinson* v. *Harman* (1848) (1), and *Rawlings* v. *Morgan* (1865) (2), per Erle, C.J. A similar rule has been applied in an action for wrongfully pulling down a house, *Hosking* v. *Phillips* (1850) (3), except where the value was personal and exceptional, *Duke of Newcastle* v. *Hundred of Broxtowe* (1832) (4); in an action for breach of covenant to build a wall, *Wigsell* v. *Corporation of the School for the Indigent Blind* (1882) (5); in an action for waste by removing soil, *Whitham* v. *Kershaw* (1885) (6), with which may be compared *Pell* v. *Shearman* (1855) (7), as to breach of covenant to sink a coal pit. It may be urged that such a rule will admit expert evidence to an inconvenient extent; but this is not a sufficient reason for acting upon a wrong principle, nor is this objection in fact obviated by the apparently more simple rule of taking the cost of repairs. It is matter of common experience that the cost of repairs is the subject of oppressive litigation.

Applying these conclusions to the present case, we think that the judgment of the official referee must be set aside, but that judgment cannot be entered for the 70*l.* or the 45*l.*, or any other sum, and a new trial must take place (unless the parties can agree) in which the question will be how much, if at all, the value of the plaintiff's estate and interest in the premises was diminished by the non-repair, regard being had to the situation and other circumstances, including the consideration that a tenant of the adjoining houses might be willing to give as much for the plaintiff's house in its unrepaired state as he would have given if the covenant had been performed. In this inquiry, the suggested doctrine (if in any case correct), that in actions brought during the term the jury are never bound to give more than

(1) 1 Ex. 850.
(2) 18 C. B. (N.S.) 776.
(3) 3 Ex. 168, at p. 182.
(4) 4 B. & Ad. 273.
(5) 8 Q. B. D. 357.
(6) 16 Q. B. D. 613 in C. A.
(7) 10 Ex. 766.

nominal damages, appears to us to be inapplicable, notwithstanding the dictum attributed to Byles, J., in *Rawlings* v. *Morgan* (1865). (1) When the action is brought after the end of the term, and the damages assessed according to legal principle are shewn to be of any particular amount, we see no justification for reducing them on the mere ground that the plaintiff has by reason of some matter not legally relevant been saved from being out of pocket or been recouped. Further, even if the referee should come to the conclusion that the damages sustained are small, we think that if a substantial breach of the covenant has been committed he would not be justified in dismissing the action, as he has practically done. The Divisional Court cannot interfere with his legal discretion as to costs; but in an action of this kind, where the defendant has made a substantial default, the circumstances must, in our opinion, be very peculiar which could make it right not merely to deprive the plaintiff of costs, but to make him pay the costs of the action. There must be an order for a new trial, and the costs of this motion will be reserved.

Judgment set aside and new trial ordered.

W. J. B.

Against this decision the defendant appealed; and the plaintiff gave a cross-notice of intention to apply for variation of the order by asking that the judgment might be entered for him for 70*l.*

Jelf, Q.C., and *W. H. Clay*, for the defendant. The plaintiff is only entitled to nominal damages, and therefore the decision of the referee was right. The general rule with regard to damages in contract is that, subject to the doctrine of remoteness, the plaintiff is to be put as far as possible into the same position pecuniarily as if the contract had been performed. The case of a breach of a covenant to deliver up demised premises in repair is no exception to this rule. It is true that, where there is damage, the cost of the repairs generally correctly measures the amount of such damage, and therefore as a general rule the cost of the repairs may in such cases be recovered. But it is submitted that there is no hard and fast rule to that effect. In this case

(1) 18 C. B. (N.S.) 776.

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the plaintiff sustained no real damage. In order to ascertain the difference between the plaintiff's position if the covenant had been performed and his position upon its being broken, all the circumstances must be regarded. In this case, the plaintiff relet the premises to another tenant under such circumstances and on such terms that he sustained no substantial damage, and is in no worse position by reason of the defendant's breach of covenant. It is not just that the plaintiff should recover the amount of the cost of repairs which he has not got to do, and so put into his pocket damages which he has not, in fact, sustained. In *Wigsell* v. *School for the Indigent Blind* (1), where the grantees of land had covenanted with the grantor to erect a boundary wall, it was held that the cost of erecting the wall was not the measure of damages for not erecting it. *Rawlings* v. *Morgan* (2) is not an authority against the defendant's contention, for the agreement with the new tenant there was verbal only, and therefore not binding. If the damages are not nominal, then the proper measure of damages is that indicated by the Court below, and this Court cannot enter judgment for the plaintiff. It has been said, no doubt, in many cases, that the measure of damages in an action for breach of a covenant to give up the premises in repair is the cost of the repairs; but it is submitted that the diminution in value of the reversion not exceeding the cost of repair is really, in all cases, the true test. It generally happens that both tests would bring out the same pecuniary result, and therefore, roughly speaking, as a general rule it may be right to give the cost of repair. In this case, however, the plaintiff had conveyed away a portion of his reversionary estate, viz., twenty-one years of it, to a third person by the second lease, and that must be a circumstance to be taken into account in estimating the amount of the damage which he sustained by the breach of the covenant. In *Davies* v. *Underwood* (3) the language of the judges seems to shew that the cost of repairs is not the sole test under all circumstances.

[They also cited *Clow* v. *Brogden* (4), and *Inderwick* v. *Leech*. (5)

(1) 8 Q. B. D. 357.
(2) 18 C. B. (N.S.) 776.
(3) 2 H. & N. 570.
(4) 2 M. & G. 39.
(5) 1 Times L. R. 95, 484.

Lumley Smith, Q.C., and *Cecil Chapman*, for the plaintiff. If the lessor is entitled by the covenant to have the possession of the premises in a particular state of repair at any given moment, and they are not so, the covenant is then broken, and the measure of damages for that breach of it is what it would cost to put them into that state. Anything which takes place afterwards between the lessor and a third person, and to which the lessee is a stranger, cannot affect the right to those damages which has already vested in the lessor. Assuming that there might be in some cases a change in the condition of the premises affecting the relation between the landlord and tenant in respect to them, which might be taken into consideration in assessing damages, as in a case where premises were destroyed by vis major or the act of God, there is nothing of that sort here. The lease to Lewis is a matter to which the defendant is an entire stranger, and is not a circumstance which can be taken into consideration. It conveyed no estate, but only an interesse termini, until possession was taken under it. Therefore the plaintiff, as between himself and the defendant, at the moment the defendant's term ended, was entitled to possession of the premises in a state of repair, and the measure of damages must be regarded with relation to that moment. The fact that an agreement was made between the plaintiff and Lewis before the end of the defendant's term could not reduce the damages, for it might never be performed; and the fact that, after the term had ended, and the plaintiff's right of action had vested, another tenant came in and executed alterations and repairs is equally immaterial. They are accidents with which the defendant has nothing to do: see *Beattie* v. *Quirey* (1), *Lombard* v. *Kennedy* (2), *Rawlings* v. *Morgan* (3), *Inderwick* v. *Leech* (4), *Rodocanachi* v. *Milburn* (5), *Woodhouse* v. *Walker* (6), and *Morgan* v. *Hardy*. (7) There are a series of cases in which it has been said that the measure of damages in an action for not delivering up the premises in repair on the expiration of the term is the cost of the repairs.

(1) Ir. Rep. 10 C. L. 516.
(2) 23 L. R. (Ir.) (Ch.) 1.
(3) 18 C. B. (N.S.) 776.
(4) 1 Times L. R. 95, 484.
(5) 18 Q. B. D. 67.
(6) 5 Q. B. D. 404.
(7) 17 Q. B. D. 778.

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It is only in actions for non-repair during the currency of the term that the diminution in value of the reversion is the test: *Vivian* v. *Champion* (1); *Yates* v. *Dunster* (2); *Duke of Newcastle* v. *Hundred of Broxstowe* (3); *Davies* v. *Underwood.* (4)

Jelf, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiff as lessor sues upon a covenant contained in a lease by which the defendant as lessee covenanted to leave the demised premises in repair. The lease came to an end; and it is not denied that the premises were left out of repair. Therefore, there was a breach of the covenant as between the lessor and the lessee. The plaintiff has proved that to put the premises into the state of repair in which the defendant was bound to leave them would cost 70*l.*; but the defendant says that he is not liable to pay 70*l.* to the plaintiff, because the plaintiff has not suffered any real loss, and therefore is only entitled to nominal damages; and he further says that, if the plaintiff has suffered any substantial damage, it is only to the amount of 45*l.*; and he pleads payment of that amount into court alternatively. The ground on which the defendant seeks to establish his case is this: he says that, while the term was running and he was in possession of the premises, the plaintiff made a demise of the premises to a third person, to commence from the determination of his lease, which demise was at an advanced rental and contained a covenant that the new lessee should pull down and alter part of the premises, and a covenant to repair; that under the circumstances the breach of his covenant did the plaintiff no harm, inasmuch as the plaintiff had re-demised the premises on terms that were not affected by the want of repair; and that, at any rate, with regard to the part of the premises that was pulled down, the want of repair did no harm. The case was sent for trial to the official referee, who gave the plaintiff a farthing damages and made him pay all the costs of the action. The plaintiff appealed to the Divisional Court, asking that the judgment might be entered for him for the amount of the dilapidations, viz., 70*l.*, or that there might be

(1) 2 Ld. Raym. 1125.
(2) 11 Ex. 15.
(3) 4 B. & Ad. 273.
(4) 2 H. & N. 570.

a new trial. The Divisional Court decided that there must be a new trial, and laid down a rule as to the measure of damages for the guidance of the official referee when the case should come before him again. From that decision the defendant has appealed to us, and there is a cross-appeal by the plaintiff. The plaintiff contends that, the facts of the case being all before us, and there being no dispute as to them, but the only question being as to the application of the law to these facts, we ought to give judgment for him for the amount of the dilapidations without putting the parties to the expense of a new trial; he contends, further, that, at any rate, we ought not to send the case back to the referee with the rule as to the measure of damages that the Divisional Court has laid down, because that rule is one which has never been heard of before in such cases, and is not the law. A great many cases have been cited, of which one only was directly in point, though another was as nearly as possible in point; and a series of dicta of learned judges have been referred to, which seem to me to shew that for a very long time there has been a constant practice as to the measure of damages in such cases. Such an inveterate practice amounts, in my opinion, to a rule of law. That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left. It is not necessary in this case to say that that is an absolute rule applicable under all circumstances; but I confess that I strongly incline to think that it is so. It is a highly convenient rule. It avoids all the subtle refinements with which we have been indulged to-day, and the extensive and costly inquiries which they would involve. It appears to me to be a simple and businesslike rule; and, if I were obliged to decide that point, I am very much inclined to think that I should come to the conclusion that it is an absolute rule. But it is not necessary to determine that point in the present case. The rule that the measure of damages in such cases is the cost of repair, is, I think, at all events, the ordinary rule, which must apply, unless there be something which affects the condition of the property

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in such a manner as to affect the relation between the lessor and the lessee in respect to it. The question is whether there is any such circumstance in the present case. I think that there clearly is not. The circumstances relied upon by the defendant did not affect the property as regards the relation between the lessor and the lessee in respect to it. They arose from a relation, the result of a contract between the plaintiff and a third person, to which the defendant was no party, and with which he had nothing to do. It was said that this contract passed an estate in the premises to such third person. If it had done so, I think it would have made no difference; but it did not; it only gave an interesse termini during the continuance of the defendant's term, and could not take effect to give an estate as between the plaintiff and the third person until the relation between the plaintiff and the defendant was at an end. At the moment of the determination of the lease between the plaintiff and the defendant, the premises were out of repair. And, if we cannot look at the contract between the plaintiff and the third person, or anything that took place under it, there was nothing but the ordinary case of the breach of a covenant to leave the premises in repair. In my opinion the contract between the plaintiff and the third person cannot be taken into account; it is something to which the defendant is a stranger. So, also, anything that may happen between the plaintiff and the third person under that contract after the breach of covenant is equally matter with which the defendant has nothing to do, and which cannot be taken into account. These are matters which might or might not have happened, and, so far as the defendant is concerned, are mere accidents. The result is that there is nothing to prevent the application of the ordinary rule as to the measure of damages in such a case. There is no decision to the contrary of what we are now deciding. In all the period of time during which leases containing such covenants have been common, there is no case in which such a contention as that of the defendant has been allowed to prevail. There are cases in which arguments as nearly as possible analogous to that of the defendant have not been assented to; for example, the case where the plaintiff had entered into a verbal agreement with a third person for the

pulling down of the premises at the expiration of the term. The case of *Morgan* v. *Hardy* (1) appears to be in point. In that case Denman, J., gave an elaborate considered judgment to the effect that the measure of damages in an action upon a covenant to leave in repair was the amount that it would cost to put the premises into such repair as was contemplated by the covenant, and that the existence of such a contract as there is here with a third person, and suchlike circumstances, could not be considered. That case is, of course, not an authority binding upon us; but it is one to which we should pay regard in deciding this case. Besides that, there is the case of *Inderwick* v. *Leech.* (2) Though that case is not exactly in point, all the reasoning of the judgment of Lopes, L.J., which was affirmed in the Divisional Court by Lord Coleridge, C.J., and Cave, J., and afterwards on appeal by this Court upon the authority of *Rawlings* v. *Morgan* (3), points in the direction of the conclusion at which we are arriving, viz., that, if anything could prevent the application of the ordinary rule that the measure of damages is the cost of such repairs as were contemplated by the covenant, it could only be something in the condition of the premises which affected the relation between the lessor and lessee in respect of them, and that contracts made between the lessor and a third person must be disregarded. The rule I have mentioned is a good working rule, and I believe it to be the legal rule. Therefore, I think that we must, with all deference to the learned judgment of the Divisional Court, allow the appeal of the plaintiff and give judgment in his favour for 70*l.*

FRY, L.J. I have come to the same conclusion. We are not now dealing with the case of an action brought during the currency of the term for non-repair, or that of an action in respect of non-performance of a covenant to build a boundary wall, or an action by a person who has granted premises at a fee farm rent, taking a covenant from the grantee to keep such premises in repair as a security for the rent, nor are we dealing with the effect of vis major, or of the act of God, upon the relation

(1) 17 Q. B. D. 770. (2) 1 Times L. R. 95, 484.
(3) 18 C. B. (N.S.) 776.

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of lessor and lessee. These cases have been adverted to and discussed during the argument; but we have nothing to do with them, except so far as they may throw any light upon the present case. The inquiry with which we are concerned in the present case is as to the measure of damages in an action by a lessor against a lessee for breach of a covenant to yield up the demised premises in repair upon the determination of the term. The considerations which apply to such a case are, as it seems to me, very different from those applicable to the other cases to which I have alluded. I have no hesitation in holding that the ordinary rule as to the measure of damages in such cases as this is that laid down in Mayne on Damages, and adopted by Denman, J., in *Morgan* v. *Hardy*. (1) He said in that case: "When the reversion has actually fallen in, I can see no reason to doubt that the proper rule is that laid down in the 4th edition of Mayne on Damages, p. 253: 'Where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them.'" That is a rule of law and practice which appears to me to have the sanction of many cases. It is supported by the language used in the case of *Davies* v. *Underwood*. (2) Watson, B., said in that case: "The damages recovered are usually such as are sufficient to put the premises in repair. As a matter of fact, it is never proved in evidence to what extent the reversion is damaged." I cannot help observing that the rule so laid down is one of great practical convenience. It is more simple than the inquiry to what extent the reversion is damaged, which appears to me to involve many matters in respect to which the lessor has nothing to say to the lessee. It is much more simple than the rule suggested by the judgment of the Court below, viz., that the measure of damages is the amount of the diminution in value of the reversion not exceeding the cost of the repairs. That involves the ascertainment of two amounts in order to take the smaller of the two. However exact such a measure of damages may be, there is, as it seems to me, a complexity about it which unfits it for determining affairs as between man and man in a court of

(1) 17 Q. B. D. 770. (2) 2 H. & N. 570.

law. I think the ordinary primâ facie rule is what I have mentioned. Then, is there anything in the present case which renders it inapplicable? What is relied upon by the defendant is the execution of a lease by the plaintiff to a third person to take effect on the determination of the defendant's lease. That lease was granted in 1887, the defendant's lease coming to an end in 1889. In what way can that lease affect the question between the plaintiff and the defendant? It may be regarded in three points of view. The first involves the question whether any estate passed by it. It was contended for the defendant that, the lessor having parted with his reversionary estate for a term of twenty-one years, his right was confined to the right to such damages as the owner of a reversion expectant upon the determination of that second lease would have sustained by reason of a breach of the covenant in the first lease. I see no ground for that contention. The second lease passed no estate until possession was taken under it. It only gave an interesse termini which would, on possession being taken, become an estate. The lessor had a right of entry on the determination of the first lease. Directly that happened a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease. Consequently that lease cannot affect the case so far as the passing of any estate under it is concerned. Then, secondly, with regard to the covenants as to alterations, &c., contained in that lease, how can such covenants, which are unperformed at the date of the vesting of the plaintiff's right of action, take away or modify the right of action which so vested? I will assume that there is a covenant in the second lease to put the premises into the same state of repair as was required by the first lease. But, even so, how can it affect the case any more than an agreement with a builder to do the repairs? It appears to me that it is res inter alios acta, with which the lessee has nothing to do and which he is not entitled to set up. Then, thirdly, how can subsequent performance by the second lessee of the covenants which he has entered into abridge or take away the cause of action that vested in the lessor before the second lease took effect? I can see no

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ground for thinking that it can do so. As a general rule, I conceive that, where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence. I can find nothing in the existence of this reversionary lease, whether I regard its operation before or after the vesting of the plaintiff's cause of action, to interfere with the application of the general rule as to the measure of damages in such cases. I therefore think that the plaintiff is entitled to judgment for 70*l.*, the cost of putting the premises into the state of repair required by the covenant.

Judgment accordingly.

Solicitors for plaintiff: *Baker & Nairne.*
Solicitors for defendant: *Paul E. Vanderpump & Eve.*

E. L.

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Ecclesiastical Law—Public Worship Regulation Act, 1874 (37 & 38 *Vict.* c. 85), *ss.* 8, 9—*Bishop's Discretion to stop Proceedings on Representation—"After considering the whole circumstances of the case"—Refusal or Excess of Jurisdiction—Mandamus.*

Sect. 8 of the Public Worship Regulation Act, 1874, provides that if, in the case of cathedral churches, any three inhabitants of the diocese, who are qualified as prescribed and have made the prescribed declaration, shall be of opinion that in such church any alteration in, or addition to, the fabric, ornaments, or furniture thereof, "has been made without lawful authority," or that any decoration forbidden by law "has been introduced into such church," they may send a representation in the prescribed form to the bishop of the diocese.

By s. 9, where a representation has been sent to the bishop under s. 8, he shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act, "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion," &c.

A representation was sent to the Bishop of London complaining that the Dean and Chapter of St. Paul's Cathedral Church had set up on a reredos in that church a figure of our Lord upon the Cross in a conspicuous position immediately above the communion table, so as to have the appearance of an altar crucifix; and a figure of the Virgin with the Child in her arms, in a conspicuous position above the figure of our Lord; that each of such figures

tended to encourage ideas and devotions of an unauthorized and superstitious kind; that each of them had in fact encouraged ideas and devotions of an unauthorized and superstitious kind; that superstitious regard and reverence had in fact been paid to them, and that they were both illegal. The bishop replied that, having in pursuance of the statute considered the whole circumstances attending the representation, he was of opinion that proceedings should not be taken, stating as his reasons that the questions raised by this representation were in substance identical with those raised by a former representation made by Allcroft and others against the Dean and Chapter of St. Paul's, and that an application by Allcroft and the others for a mandamus to compel the bishop to act in furtherance of the proceedings as prescribed by the statute, having been refused by the Court of Appeal, was then pending in the House of Lords. The former representation differed from this second representation only in the respect that the second representation alleged that the figures complained of had in fact encouraged ideas and devotions of an unauthorized and superstitious kind, and that superstitious regard and reverence had in fact been paid to them. On an application by the present complainants for a mandamus to compel the bishop to act in furtherance of the proceedings as prescribed by the statute:—

Held, by Hawkins, J., that ss. 8 & 9 of the Public Worship Regulation Act, 1874, did not impose upon the bishop any duty to take cognizance of the new matter alleged in the second representation as constituting a new offence, and that, the bishop having stated that he had considered the whole circumstances of the case, the application for a mandamus ought to be refused:

Held, by Stephen, J., dissenting, that the bishop's reply to the representation shewed that he had not sufficiently considered the whole circumstances of the case within the meaning of s. 9, and therefore that the application for a mandamus ought to be granted.

RULE, obtained on behalf of Sir C. R. Leighton, Bart., and three other inhabitants of the diocese of London, calling upon the Bishop of London to shew cause why a writ of mandamus should not issue commanding him to transmit a copy of the representation of the applicants to the persons complained of, namely, the Dean and Chapter of the cathedral church of St. Paul, in the city of London, and proceed therein in accordance with the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85); or, in the alternative, commanding the bishop to proceed to consider the whole of the circumstances of the case affecting such representation, without considering any other circumstances, or taking into consideration reasons other than the circumstances of the case.

The applicants, all of them being persons qualified so to do under the provisions of s. 8 of the Public Worship Act, 1874 (1),

(1) Sect. 8 provides that if, in the case of cathedral churches, any three inhabitants of the diocese, being male persons of full age, who have signed

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on May 1, 1890, duly made a representation in writing to the Bishop, stating that:—

(1.) The dean and chapter of the cathedral church of St. Paul, in the city of London, within five years before the date hereof, that is to say, in the month of January, 1888, have introduced into the said cathedral church, and set up upon the altar-piece or reredos therein, an image or sculptured subject, representing our Lord upon the Cross, in a conspicuous position immediately above the communion table, the figure of our Lord being of the height of five feet or thereabouts.

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and transmitted to the bishop under their hands the declaration contained in Schedule A under this Act, and who have, and for one year next before taking any proceeding under the Act have had, their usual place of abode in the diocese within which the cathedral church is situated, shall be of opinion that in such church any alteration in, or addition to, the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church, such inhabitants may send a representation in the prescribed form, duly filled up and signed, accompanied by a statutory declaration as therein mentioned, affirming the truth of the statements contained in the representation.

By s. 9: "Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion . . . and a copy thereof shall forthwith be transmitted to . . . some one of the persons who have made the representation, and to the person complained of), he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing within twenty-one days, whether they are willing to submit to the directions of the bishop touching the matter of the said representation, without appeal, and if they shall state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition . . . provided that no judgment so pronounced by the bishop shall be considered as finally deciding any question of law, so that it may not be again raised by other parties . . . If the person making the representation, and the person complained of shall not within the time aforesaid state their willingness to submit to the directions of the bishop, the bishop shall forthwith transmit the representation to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster."

(2.) The said image or sculptured subject is constructed so as to have the appearance of such an altar crucifix as was used in the Church of England immediately before the Reformation, and so as to answer the purposes for which such a crucifix was intended.

(3.) The said dean and chapter, within five years before the date hereof, that is to say, in the month of January, 1888, have introduced into the said cathedral church, and set up upon the said altar-piece or reredos therein, an image or sculptured subject representing the Blessed Virgin Mary, with the Child in her arms, in a conspicuous position a few feet above the first herein-mentioned image or sculptured subject, the figure of the Blessed Virgin being of the height of five feet six inches, or thereabouts.

(4.) The said two images or sculptured subjects, and each of them, tend and tends to encourage ideas and devotions of an unauthorized, idolatrous, and superstitious kind, and are and is in danger of being abused; and unauthorized, idolatrous, and superstitious regard and reverence are likely to be paid to the said two images or sculptured subjects, and each of them; all which allegations we are prepared to establish by evidence or otherwise, at the hearing and trial of the suit or proceedings hereby commenced.

(5.) The said two images or sculptured subjects, and each of them, have and has, in fact, encouraged ideas and devotions of an unauthorized, idolatrous, and superstitious kind, and have and has been, in fact, abused; and unauthorized, idolatrous, and superstitious regard and reverence have been, in fact, paid to the said two images or sculptured subjects, and each of them; all which allegations we are prepared to establish by evidence and otherwise, at the aforesaid hearing and trial.

(6.) The setting up of the said images or sculptured subjects, and of each of them, tends to bring about, and has, in fact, brought about, breaches and violations of the 22nd Article of Religion, which allegations we are prepared to establish by evidence and otherwise at the aforesaid hearing and trial.

(7.) The said images or sculptured subjects, and each of them, are and is additions and an addition to the fabric, ornaments, or

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furniture of the said cathedral church, and are and is decorations and a decoration forbidden by law.

On May 9, 1890, the bishop, in pursuance of s. 9, delivered his reply to the applicants as follows:—

"We Frederick, by Divine permission Bishop of London, having in pursuance of the provisions of the Public Worship Regulation Act, 1874, considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reason, namely:—

"That the questions raised in this case are in substance identical with those raised in the case of the representation of Allcroft and others against the Dean and Chapter of St. Paul's (1), and the application for a mandamus by Allcroft and others against us, and that such application is now pending on appeal to the House of Lords, and will shortly be ready for hearing by that tribunal."

This rule was obtained on June 17, 1890.

On July 9, 1890, the bishop made an affidavit stating (inter alia) as follows:—

(1.) "After considering the whole circumstances of the case, according to the provisions of the Public Worship Regulation Act, I was and am of opinion that the main question raised on the representation (hereinafter called the first representation) is identical with the main question raised by the present representation, videlicet, whether certain portions of the reredos of St. Paul's Cathedral are or are not illegal.

(2.) "Comparing the first representation with the present representation, paragraphs 1, 2, and 3 are in all material respects in the same words, and the concluding paragraphs of both representations are practically identical.

(3.) "As to paragraph 4 of the first representation, of which the place is taken in the present representation by paragraphs 4, 5, and 6, the additions in substance made therein appear to me to amount to allegation that in fact certain idolatrous regard and superstitious reverence have been paid to the sculptured subjects in question, such idolatrous regard and superstitious reverence amounting to breaches of the 22nd Article of Religion.

(1) See *Reg.* v. *Bishop of London*, 23 Q. B. D. 414; 24 Q. B. D. 213.

(4.) "I was, therefore, and am of opinion that the object of these allegations could be only to support the contention common to both representations, videlicet, that certain portions of the reredos of St. Paul's Cathedral are illegal.

(5.) "It appeared, and still appears, to me that it was highly inexpedient that the present representation should be allowed to proceed until it was determined by the result of the present proceedings in the House of Lords whether the first representation should proceed or not; and further, until the guidance on several of the legal points of the case which may be expected from the judgments of the ultimate Court of Appeal could be obtained; and I submit that my decision, based on this opinion, is a good and valid decision under the provisions of the Act in that behalf."

Sir R. E. Webster, A.G. (*Lewis Coward*, with him), for the Bishop of London, shewed cause. An application identical with that now in question was made to the bishop, and refused by him, and the Court of Appeal discharged a rule for a mandamus to compel him to act: *Reg.* v. *Bishop of London.* (1) An appeal from that decision is pending in the House of Lords. Meanwhile, the applicants endeavour to bring the case again before the bishop. But on this representation, as on the former one, he has exercised his discretion "after considering the whole circumstances of the case," within s. 6 of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85). There is no material difference between the first representation made to him and the second. The question in both was whether the erection of the figures in the reredos was contrary to law. All the material facts as to the nature of the figures were before the bishop and discussed, and he considered the whole circumstances, and came to the conclusion that the questions raised were in substance identical with those in the case under appeal. His decision is, therefore, final.

Jeune, Q.C. (*Lewis Coward*, with him), appeared for the Dean and Chapter of St. Paul's.

Moulton, Q.C., and *Danckwerts*, for the applicants, supported

(1) 24 Q. B. D. 213.

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the rule. The representations in the two cases were not identical. Images are not necessarily illegal in churches: *Phillpotts* v. *Boyd.* (1) To be illegal, they must be images which are either likely to be used, or are in fact used, for superstitious reverence, as Lord Penzance explained in *Clifton* v. *Ridsdale.* (2) The questions whether the images are likely to be used, or whether they are in fact used, for superstitious reverence, are different. The bishop has said in effect that, whether the images are illegal or not, he declines to interfere. He takes up the position that this case only differs from the former in that here there is the allegation that superstitious reverence has in fact been paid to the images; and he seems to have come to the conclusion that, if that allegation were proved, it would only amount to an allegation that the images were illegal, which, he says, was the only question raised by the first representation. He has, therefore, not considered the whole circumstances of the case, within s. 9. Whether the two cases are identical is a matter of fact, and not of opinion. The second representation alleges something perfectly separate and independent from the allegations in the first; and the bishop, on the second representation, having come to an erroneous conclusion in point of fact, the judgments of the Court of Appeal in the first case shew that the mandamus ought to go.

Jeune, Q.C., in reply. In *Clifton* v. *Ridsdale* (2), the passage referred to in Lord Penzance's judgment (at pp. 358, 359) states two tests of illegality—first, whether the thing complained of tends to adoration, worship, or superstitious reverence; and, secondly, whether adoration, worship, or superstitious reverence has been given to it by those who worship in the church. But those are merely tests to be applied in answering the sole question which the bishop has to decide—namely, whether the thing complained of is likely to produce superstitious and unlawful adoration, worship, or reverence.

Cur. adv. vult.

1890. Nov. 14. STEPHEN, J. This case arises under the Public Worship Regulation Act, 1874. A representation under

(1) Law Rep. 6 P. C. 435. (2) 1 P. D. 316, at pp. 358-9.

that Act has been made to the Bishop of London. In answer to that representation the bishop has directed that the case ought not to be further proceeded with for reasons which he has given, and we are now asked to make absolute a rule for a mandamus to the bishop to compel him to allow further proceedings in the matter. We have anxiously considered the arguments addressed to us, and I am sorry to say that we have not been able to agree. My brother Hawkins thinks that a mandamus ought not to go, whilst I am of opinion, with considerable doubt, that it ought. The rule will, therefore, be discharged, on the ground that the Court are divided in opinion. It is unnecessary for me to go into every step which has been taken in this matter, or to refer to the documents which shew that the persons who have made the representation had a good title to make it, and I will, therefore, come at once to what is the decisive point in the case. The bishop's ground for refusing to allow further proceedings is as follows: [The learned judge read the Bishop of London's reply to the representation, and the second, third, and fourth paragraphs of his affidavit.] Now there is no question about the good faith of the bishop's proceeding, and no doubt that he has honestly attempted to discharge his legal duty; nor is there any doubt that he does in good faith believe that the proceedings in this case are substantially the same as in the former case, and that the charge of illegality contained in the representation before us adds nothing to the charge of illegality contained in the representation made in the former case. But I am of opinion that the bishop has not considered all the circumstances of the case within the meaning of s. 9 of the Public Worship Regulation Act, 1874. His view has been taken under a distinct mistake as to the nature of the representation in this case. It has apparently escaped his attention that this representation goes considerably beyond the former representation, because it charges an entirely different sort of offence. It couples with the fact that the images or objects in question tend to induce superstitious veneration the fact that they have had that effect, and that superstitious veneration has in fact been offered to them. That is a separate and distinct charge with respect to the persons who have the control of them. I think that the bishop has overlooked the

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fact that in this second representation, not one charge only, but two charges are stated; and the second charge may give rise to questions of law and fact which were not in issue on the first charge, which was the subject-matter of the first representation. I, therefore, think that a consideration of the charges made in the first representation does not exhaust the matter which ought to be considered in the second. To illustrate my view by reference to a totally different subject, it is as if upon a trial for larceny the judge should overlook the fact that there were two indictments—one for stealing, and the other for receiving the goods knowing them to be stolen. To say that the indictment which charged receiving did not materially differ from the indictment which charged stealing, would be wrong, and it would be overlooking the fact that the two charges were wholly different. That illustration is, I think, precisely in point here. The material difference between the charges made in the first representation and those made in the second is sufficient, in my view, to vitiate the bishop's proceedings in this particular case. In the judgments of the Court of Appeal in *Reg.* v. *Bishop of London* (1), as well as in the judgments of the Courts in other cases, particular attention was called to the fact that there was no charge that the images or objects complained of had been used for superstitious worship. Those cases, therefore, are only precedents where that charge is not made, and they afford no precedent in cases where it is made. For those reasons I am of opinion that the applicants are entitled to the mandamus for which they are asking.

HAWKINS, J., read the following judgment:—I have the misfortune to differ from my brother Stephen, for reasons which I will proceed to state. It is necessary to state them at somewhat greater length than I should otherwise have done, because the matter upon which I base my decision was very little touched upon in the arguments.

On June 17 last a rule nisi was granted by a Divisional Court calling upon the Bishop of London to shew cause why a mandamus should not issue commanding him to transmit a copy of

(1) 24 Q. B. D. 213.

a representation of Sir Christopher Robert Leighton, and three others, to the persons complained of, namely, the Dean and Chapter of St. Paul's, and proceed thereon further in accordance with the Public Worship Regulation Act, 1874; or, in the alternative, why a mandamus should not issue commanding him to proceed to consider the whole of the circumstances of the case affecting such representation, without considering any other circumstances, or taking into consideration reasons other than the circumstances of the case.

This rule came on for argument before my brother Stephen and myself, early in the present sittings, and we now have to give our judgments upon it.

The representation referred to in the rule was made and sent to the bishop on May 1, 1890, and, omitting the formal parts thereof, represented in these words:—"That," &c. [His Lordship read the representation.] On the 9th of May, the bishop duly stated in writing, and deposited in the registry of the diocese, his opinion touching the said representation and his reason therefor. Such opinion and reason were as follows:—[His Lordship read the bishop's reply to the representation, and the 3rd, 4th, and 5th paragraphs of his affidavit made on July 9, 1890.] It is necessary, in order thoroughly to understand this case, that I should now shortly describe the proceedings in the case of *Allcroft and Others* (1), referred to by the bishop. On May 4, 1888, one Allcroft and three others, made a representation to the bishop complaining of the Dean and Chapter of St. Paul's respecting the introduction and setting up of identically the same images or sculptured subjects as are made the subject of Sir C. Leighton's representation, charging simply (in paragraph 4) that each of the said images or sculptured subjects "tends to encourage ideas and devotions of an unauthorized and superstitious kind, and is unlawful; and" (in paragraph 5) "that the said images or sculptured subjects are respectively additions to the fabric, ornaments, or furniture of the said cathedral church, and are decorations forbidden by law." On May 23, 1888, the bishop duly stated in writing his opinion that, having considered the whole circumstances of that representation, he was of opinion that proceedings

(1) See *Reg.* v. *Bishop of London*, 23 Q. B. D. 414; 24 Q. B. D. 213.

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should not be taken thereon, and he stated at length his reasons for such opinion, the principal reason being that substantially the principle at issue had been already decided in *Phillpotts* v. *Boyd* (3), in which the reredos in Exeter Cathedral, shewing a figure of our Lord in the act of ascending into Heaven, was held to be lawfully erected, and that in his view it could not be said that the one reredos offered serious temptations to idolatry and the other did not. With that opinion Allcroft and his fellows were dissatisfied, and obtained from a Divisional Court a mandamus to compel the bishop to take further proceedings upon their representation. On appeal made by the bishop, the Court of Appeal on December 17, 1889, reversed the judgment of the Divisional Court, and against this reversal an appeal to the House of Lords is now standing for argument. The arguments and judgments in the Divisional and Appeal Courts, with copies of the various documents, will be found in 23 Q. B. D. 414 and 24 Q. B. D. 213. It was not, of course, open to the learned counsel for Sir C. Leighton to contend before us against the judgment of the Court of Appeal, nor do I think he could have hoped, if the two representations of Allcroft and Sir C. Leighton, and the questions raised therein, were substantially identical, successfully to contend that the opinion of the bishop, and the reason assigned, namely, that the later representation ought not to be proceeded upon until the earlier one had been finally adjudicated upon by the House of Lords, were not unimpeachable. It was contended, however, that the representations were not identical either in form or in substance, and for these reasons: First, that the new averments introduced into the representation of Sir C. Leighton in paragraphs 5 and 6, in themselves furnished fresh and distinct grounds of complaint which were not to be found in Allcroft's representation; and, secondly, that the additional matters introduced into paragraph 4, and the statements in paragraphs 5 and 6, were, at all events, new circumstances not present to the bishop's mind in the earlier case, and which of themselves required the fresh consideration of the bishop. I propose to deal with these reasons in their order. First, do the new statements in the representation of Sir C. Leighton

(3) Law Rep. 6 P. C. 435.

furnish new ground of complaint against the dean and chapter; and, if so, is such new ground of complaint one over which the bishop has jurisdiction under the 8th section of the Public Worship Regulation Act? For if no such new ground of complaint is shewn, or if, being shewn, the bishop has no jurisdiction over it, no duty is cast upon him to take cognizance of it. Now, the new or additional circumstances introduced into Sir C. Leighton's representation may be shortly stated as follows: that though the images when first erected may have been innocent and harmless, and may not then have had any tendency to encourage idolatrous ideas or devotions, they are now in danger of being abused, and idolatrous reverence is in the future likely to be paid to them; that in fact such images have since their erection encouraged such idolatrous ideas and devotions, and that superstitious regard and reverence have been in fact paid to them; and, moreover, that the setting up of the images has tended to bring about, and has brought about, breaches of the 22nd Article of Religion; and so it was contended that, even if lawful in their origin, they have become unlawful by reason of the new matters now charged. That the law by some proceeding or other will interfere to prevent the idolatrous worship of images, however lawful their origin may have been, and however innocent their tendency, cannot, I am afraid, be questioned. In delivering the judgment of the Privy Council in *Phillpotts* v. *Boyd* (1), Lord Hatherley said: "Their Lordships desire it to be clearly understood that nothing decided in this case affects the question of superstitious regard being paid, contrary to the 22nd Article of Religion, to any representations or images that are, or may at any time be, set up in churches. The law will at all times be sufficiently strong to correct and control any such abuse." In *Clifton* v. *Ridsdale* (2), Lord Penzance says: "I doubt whether any narrower or more exact definition of what is lawful and what unlawful can, for practical purposes, be framed than that which is set forth in the case of *Phillpotts* v. *Boyd*. (3) But, adhering to that decision, and each case standing on its own circumstances, it is, I think, to be presumed that the Court of Appeal would not hesitate to

(1) Law Rep. 6 P. C. 435, at p. 467. (2) 1 P. D. 316, at p. 358.
(3) Law Rep. 6 P. C. 435.

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adjudge even painted windows, or paintings portraying the same subject, to be unlawful if it was satisfied from the mode in which the subject was treated, the place which they occupied, or other the incidents in surrounding circumstances, that they were in real danger of adoration, worship, or superstitious reverence. So long as they are free from this charge, and fulfil no other function but that of fitly decorating the church, they are free from objection; the moment that from any cause, whether residing in the objects themselves, or arising among those who worship in the church, the danger of their adoration is made manifest, I conceive that they cease to be innocent, and fall under the charge of illegality." What is to be done in such a case, I do not pretend to say. Whatever the law is upon the subject, it must, of course, be obeyed; but I trust in any event some other alternative will be found open to the dean and chapter than the removal or destruction of objects in themselves beautiful and elevating, erected by lawful authority, having in themselves, in the bishop's opinion, no tendency to provoke the superstitious reverence of reasonable persons, but which may yet be proclaimed unlawful and calculated to sap the foundation of the Established Church simply because some erratic or capricious persons have, in their folly or ignorance, offered idolatrous worship to them. To me, I own, if the law permitted, it would seem more reasonable to expel the idolatrous than the images. Assuming, however, that the images would be rendered unlawful by reason of the matters complained of in paragraphs 5 and 6 of the representation, such complaints do not appear to me to come within the cognizance of the bishop upon such proceedings as those instituted by Sir C. Leighton and his fellows. The jurisdiction conferred upon the bishop by the 8th and 9th sections of the Public Worship Regulation Act, 1874, is confined to such matters as are specifically pointed out in the 8th section, namely, to complaints, first, that in such church "any alteration in or addition to the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church;" secondly, that the incumbent has used, or permitted to be used, unlawful ornaments of the minister, &c.; thirdly, that the incumbent has failed to

observe the directions contained in the Book of Common Prayer relating to the performance of services, &c. We have only to deal with the first of these matters of complaint, the essential elements of which are the making, without lawful authority, alterations in or additions to the fabric, ornaments, or furniture, or the introduction of forbidden decorations. The continuance of alterations or additions not unlawful when made, but which have since become so, or the continuance of decorations not forbidden when they were introduced, but which have since become so, is not pointed at in the section. To continue a thing already made is not to make it; nor is the continuance of a thing already introduced to introduce it. Now, the bishop has already in Allcroft's case substantially expressed his opinion, based upon the authority of *Phillpotts* v. *Boyd* (1), that the images set up upon the reredos in question were not unlawful when set up. By that opinion, which is substantially repeated in the present case, we are for the purposes of this case bound. It follows, therefore, if my interpretation of the language of the statute is correct, that the bishop is not bound to take cognizance of the new matter introduced into the present representation as constituting a new offence. In short, it comes, in my mind, to this: If the new matter discloses a new and distinct offence, it is not one within the jurisdiction of the bishop, under the Public Worship Act. Stripped of such new matter, the two cases are in substance identical. But it may be argued that, even if the new matter does not furnish in itself ground of complaint, at least it ought to be regarded as some evidence that the images had from the first a tendency to provoke idolatry, and therefore the bishop was bound to consider them as circumstances of the case. My answer to this argument is that the bishop, in his statement and in his affidavit, alleges that he has "considered the whole circumstances attending the representation." Why are we to be asked to say that he has not done so? I refuse to come to such a conclusion. If he has honestly considered them, and upon them, and them only, he has formed the opinion upon which his action is to depend, he has fulfilled the only obligation cast upon him by the law, and the opinion so formed is not open

(1) Law Rep. 6 P. C. 435.

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to appeal. The statement of the bishop's reason for his opinion is not essential to the validity of it; but still, with other objects in view, which I need not consider, the legislature has required that the bishop's reasons shall be deposited in the registry of the diocese; and, if the bishop were to disobey the law, and refuse to observe its requirements in this respect, a mandamus no doubt would lie commanding his obedience. But in this case he has registered his reason which influenced him in forming his opinion, and against that reason there is again no appeal. Both the opinion and the reason may be good or bad, but they are, I am satisfied, the bonâ fide opinion and reason of the bishop, based on the whole circumstances of the case, and there is no evidence to satisfy my mind that his judgment has been in the least influenced by any other circumstances or considerations.

In this state of things, to issue a mandamus commanding the Bishop of London to send forward the representation, in the teeth of his opinion that he ought not to do so, or to compel him to consider the circumstances of the case, and no others, when I am satisfied he has already done so, is not what reason or the law requires, and therefore I think this rule ought to be discharged.

Rule discharged.

Solicitors for applicants: *Wainwright & Baillie.*

Solicitors for Bishop of London and Dean and Chapter of St. Paul's: *Lee, Bolton & Lee.*

Solicitors for Dean of St. Paul's: *Brooks, Jenkins & Co.*

W. A.

[IN THE COURT OF APPEAL.]

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Feb. 10; *March* 2; *April* 7; *May* 15.

IN RE AN ARBITRATION BETWEEN KNIGHT AND THE TABERNACLE PERMANENT BUILDING SOCIETY.

Arbitration—Building Society—Dispute between Society and Member—Reference to Arbitration—Special Case, Power of Court to order Statement of—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 36—*Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 19, 24.

Sect. 19 of the Arbitration Act, 1889, which provides that an arbitrator shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, applies to arbitrations under the Building Societies Act, 1874:—

So *held*, reversing the judgment of the Queen's Bench Division.

APPEAL from an order in chambers directing the arbitrators in an arbitration under the Building Societies Act, 1874, to state a case for the opinion of the Court. (1)

A dispute, which had arisen between a building society and one of its members named Knight, was, in accordance with the rules of the society, referred to arbitration under s. 34 of the Building Societies Act, 1874. During the arbitration a request was made to the arbitrators, on behalf of Knight, to state a special case for the opinion of the Court, upon a point of law which had arisen in the course of the proceedings; this the

(1) By s. 36 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), it is provided that "Every determination of arbitrators . . . . under this Act, of a dispute, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any Court of law, or restrained or restrainable by the injunction of any Court of Equity; provided always that the arbitrators . . . . may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law . . . .

By s. 19 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49): "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

Sect. 24 provides that: "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act, as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act."

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arbitrators refused to do. Thereupon an order was applied for and obtained at chambers, on behalf of Knight, under s. 19 of the Arbitration Act, 1889, directing the arbitrators to state a special case for the opinion of the Court.

Feb. 10. *Macoun*, for the appellants, the building society. The order is bad. The decision of the arbitrators is made final by s. 36 of the Building Societies Act, 1874, and the discretion as to stating a case on a point of law, which is given to them by that section, is not subject to review by the Court. It is true that s. 19 of the Arbitration Act, 1889, gives a very wide and general power to the Court to order an arbitrator to state a special case, and would be applicable to the present case, if it stood alone; but this section must be read subject to the limitation imposed by s. 24, which prevents the Arbitration Act applying where it is inconsistent with the Act regulating the arbitration. Sect. 19 is plainly inconsistent with s. 36 of the Building Societies Act, which is the Act regulating the arbitration, and s. 19 has, therefore, no application to arbitrations under that Act.

Fillan, for the respondent Knight. The order was right, and should be affirmed. There is no inconsistency between s. 19 of the Arbitration Act and s. 36 of the Building Societies Act. The latter section gives the arbitrator power to state a special case, and there is no inconsistency in the Court ordering him to do what he has the power to do without an order.

WILLS, J. This case raises a question of some importance which could not be satisfactorily argued in chambers, but which now upon careful examination seems to be free from difficulty. Proceedings before arbitrators upon a reference to arbitration of a dispute between a building society and one of its members are regulated by s. 36 of the Building Societies Act, 1874, the substantial part of that code of procedure being that the arbitrators are to have complete jurisdiction independent altogether of the High Court, unless they choose for their own satisfaction to invoke the aid of the Court upon a point of law, in which case they have power under the section to state a special

case for the opinion of the Court. I quite assent to the suggestion that there is no verbal inconsistency between s. 36 of the Building Societies Act, 1874, and s. 19 of the Arbitration Act, 1889, but the old maxim "Qui hæret in literâ hæret in cortice" applies with especial force to the present case. Regard must be had to the nature of the disputes which go to arbitration under the Building Societies Acts, to the class of litigants engaged in those disputes, and to the unquestionable fact that one of the objects of the legislature was to provide for members of these societies a tribunal which should be cheap and easy of resort, and which, though perhaps not the best tribunal possible, was yet free from the danger of causing heavy expense to the litigants.

The substance of s. 36 is in my view this. The arbitrators are to be the tribunal, and their jurisdiction is to be complete and final except that the arbitrators may, if they choose, themselves apply to the Court for assistance. Now the Arbitration Act, 1889, is a general Act, and contains words in s. 19, which, if that section stood alone, would unquestionably give the Court power to make the order which has been made in the present case. But then there comes s. 24, the language of which is quite clear and unambiguous, and which provides that that Act shall apply to any arbitration under any Act except in so far as the Act of 1889 is inconsistent with the Act regulating the arbitration. The substance of s. 36 of the Building Societies Act being what I have stated already, the provisions of s. 19 of the Arbitration Act are clearly inconsistent with it, and therefore the latter Act does not apply to this arbitration. Upon this ground therefore, I am of opinion that the order appealed against is wrong and should be reversed.

VAUGHAN WILLIAMS, J. I am entirely of the same opinion, and will only add a few words upon the suggestion that the provision in s. 19 of the Arbitration Act, which gives the arbitrator power to state a case for the opinion of the Court, is not inconsistent with s. 36 of the Building Societies Act. To my mind s. 19 is entirely inconsistent with the tenor of the Building Societies Act, if I rightly understand the effect of

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the decisions in *Wright* v. *Monarch Investment Building Society* (1), and *Hack* v. *London Provident Building Society* (2). In each case questions had been raised as to whether the arbitrators had exclusive jurisdiction, or whether their jurisdiction was subject to the control of the Court, and it was held that their jurisdiction was exclusive. In both cases it was argued that the legislature could not have intended to give the arbitrators power to decide questions of law and to make orders, the execution of which might require machinery like that of the Chancery Division, but the answer was that the difficulty was met by s. 36, which gave the arbitrators power, if they thought fit, to state a special case. To say that the Court now has power to make the arbitrators state a special case is to deprive them of the exclusive jurisdiction given them by the Building Societies Act, and is plainly inconsistent with that statute.

Appeal allowed.

W. J. B.

Against this decision Knight appealed.

March 2 and April 7. *Fillan*, for the appellant, Knight. The provisions of s. 19 of the Arbitration Act, 1889, are not inconsistent with those of s. 36 of the Building Societies Act, 1874. The power to order the arbitrators to state a case in no way interferes with the finality of their award. It does not give jurisdiction to the High Court over the dispute; the Court merely give their opinion on the point of law raised by way of instruction to the arbitrators in making their award. The 36th section of the Building Societies Act provides that the arbitrators may state a case. The provision of s. 19 of the Arbitration Act that they shall do so, if directed by the Court or a judge, is merely an addition to the provision of s. 36 and is not inconsistent with it. He cited *Municipal Building Society* v. *Kent*. (3)

Macoun, for the respondents, the building society. By the 36th section of the Building Societies Act, 1874, it was left entirely in the discretion of the arbitrators whether they would

(1) 5 Ch. D. 726. (2) 23 Ch. D. 103.
(3) 9 App. Cas. 260.

state a case. A provision that they may be compelled to do so is clearly inconsistent with that section.

[FRY, L.J. The term "inconsistent" as used in the Arbitration Act cannot mean "producing any variation from" or otherwise the Act could never be applied to an arbitration under a previous Act. I should suppose that provisions were not inconsistent within the meaning of the Act if they could stand side by side.]

Under the 36th section of the Building Societies Act the jurisdiction of the High Court is ousted, and the determination of the arbitrators is final, except so far as the arbitrators may in their discretion apply to the Court for their opinion on a point of law by way of special case. It is inconsistent with the scheme of that section that the High Court should have a jurisdiction which in substance is an appellate jurisdiction in respect to the arbitrators' award.

Fillan, in reply. The proviso to s. 36 of the Building Societies Act, 1874, is an enabling provision, giving the arbitrators power to state a case, and it only gives them a discretion in the sense that it does not make it compulsory for them to do so; there is no inconsistency in the sense intended by s. 24 of the Arbitration Act, in adding to that a further provision that if required by the Court or a judge they shall do so.

Cur. adv. vult.

May 15. The following judgments were delivered:—

LORD ESHER, M.R. In this case an order was made by a judge at chambers under the Arbitration Act, 1889, s. 19, directing the arbitrators who were arbitrating in a dispute between a member of a building society and the society, under the Building Societies Act of 1874, to state a case. That section provides that "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference." The judge's order was set aside by the Divisional Court, and the question before us is whether

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we agree with the order that was made or with the Divisional Court.

It was said that this section could not be applied to arbitrators acting under the Building Societies Act. The question whether that is so or not depends upon the terms of s. 24 of the Arbitration Act of 1889. That section provides that "this Act shall apply to every arbitration under any Act passed before or after the commencement of this Act, as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration." It was the right of the parties, therefore, to ask a judge for the order under s. 19, and the judge had power to make such order, unless that section is inconsistent with the provisions of the Building Societies Act of 1874. The Divisional Court were of opinion that s. 19 of the Arbitration Act of 1889, was inconsistent with the Building Societies Act, and, that being so, it did not apply to this case. Sect. 36 of the Building Societies Act, 1874, provides that: "Every determination by arbitrators under this Act of a dispute, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal." It is said that this provision is inconsistent with the power of the judge to order a case to be stated for the opinion of the Court, because, if the arbitrators could be forced to state a case for the decision of the Divisional Court, there would in effect be an appeal, and the decision of the arbitrators would not be binding and conclusive upon all parties, or final to all intents and purposes. After carefully considering the matter, I am of opinion that those two sections are not inconsistent. What the Court really does when a case is stated for its opinion by arbitrators is to determine the point before it by way of instruction to the arbitrators, which no doubt they are bound to follow. To instruct them as to what their decision is to be does not destroy the finality of their decision when they have made it in accordance with the direction of the Court upon the special case I do not see, therefore, that the two sections are inconsistent. If they are not inconsistent, then s. 24 of the Arbitration Act allows the application to be made under s. 19; and, the application having been made under that section, I

think that the order of the learned judge at chambers who directed the special case to be stated was right, and I do not agree with the decision of the Divisional Court that he had no jurisdiction to make that order.

I think, therefore, that the appeal must be allowed.

FRY, L.J. I am of the same opinion. The question arises under the Arbitration Act of 1889. The 19th section of that Act provides that any arbitrator "shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference"; and s. 24 provides that the Act shall apply to every arbitration under any Act passed before the commencement of this Act, "as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognised by that Act." Now, what is the meaning of "inconsistent with the Act regulating the arbitration"? Sect. 19 creates, no doubt, an obligation to state a case when directed by the Court or a judge; and, of course, in one sense, the presence of the obligation to state a case is inconsistent with the absence of such obligation. Therefore, it may be argued that, where under a previous Act there was no obligation to state a case, while under a later Act such an obligation is created, there is an inconsistency between the Acts. But that is not in my view the real meaning of the "inconsistency" referred to in s. 24. I think there must be an inconsistency of this kind, *viz.*, that the obligation to state a special case would be so at variance with the machinery and with the mode of procedure indicated by the previous Act, that, if that obligation were added, the machinery of the previous Act would not work. Now, what was the machinery and mode of procedure indicated by the Building Societies Act? The 34th and 35th sections respectively provide for the appointment of arbitrators, and for the hearing and determining of all disputes. Then s. 36 provides that "every determination by arbitrators, or by the Court, or by the registrar under this Act of a dispute shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and

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shall not be subject to appeal, and shall not be removed or removable into any court of law, or restrained or restrainable by the injunction of any Court of Equity." Then comes the proviso that, "the arbitrators may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law." Is the obligation to state a case for the opinion of the Supreme Court inconsistent with anything in that 36th section? It must be observed that the case is to be stated on any question of law arising in the course of the reference. It must necessarily precede the determination of the reference. It is a condition precedent to the award. It cannot in any way prevent the determination by the arbitrators from being binding and conclusive upon all parties, nor does it render such determination otherwise than final to all intents and purposes, nor make it subject to appeal, or removable into any court of law, or restrainable by the injunction of any Court of Equity. All those attributes of an award under the 36th section must still attach to it, notwithstanding that in the course of the proceedings the arbitrators may be required to state a special case for the opinion of the Court. In fact, the 19th section of the Act of 1889 only adds to the proviso which already existed, giving power to the arbitrators, whenever they think fit, to state a case, the additional provision that they shall, when the Court requires them, state a case. I think, therefore, that there is nothing whatever in the obligation to state a case inconsistent with the machinery provided by the Act of 1874, and that, therefore, the appeal must succeed. It appears to me that the Act of 1889 was intended to introduce a code with regard to arbitrations, and that its operation is only excluded from arbitrations with which it is absolutely inconsistent.

BOWEN, L.J., concurred.

Appeal allowed.

Solicitors for appellant: *Hatchett-Jones & Co.*
Solicitor for respondents: *J. R. Pakeman.*

E. L.

THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT AND ANOTHER.

1891 *April* 24.

Practice—Counter-claim—Discontinuance of Action—Power to Order Trial of Counter-claim in County Court after Discontinuance of Action—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

A counter-claim in an action cannot, after the action has been discontinued, be remitted for trial to a county court under s. 65 of the County Courts Act, 1888.

RULE obtained by the plaintiff in an action calling upon the defendant and the judge of the City of London Court, to shew cause why the judge should not try a counter-claim which had been remitted to that Court for trial under s. 65 of the County Courts Act, 1888. It appeared that the action was brought in the High Court by the plaintiff as indorsee, against the defendant as acceptor of a bill of exchange for 25*l.* The plaintiff obtained judgment under Order XIV. for 8*l.*, and the defendant had leave to defend as to the residue. The defendant in his defence pleaded that the bill had been indorsed to the plaintiff without consideration, and counter-claimed against the plaintiff for the breach of an alleged agreement with respect to the bill, claiming in his particulars a sum of 18*l.* 10*s.* The plaintiff gave the defendant notice that he discontinued the action, and delivered a defence to the counter-claim in which he denied that he had made the alleged agreement. After joinder of issue on the counter-claim, the order in question was made on the application of the plaintiff. The judge of the City of London Court held that he had no jurisdiction to try the counter-claim.

Danckwerts, shewed cause. Under s. 65 of the County Courts Act, 1888 (1) there was no jurisdiction to remit the counter-

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65: "Where in any action of contract brought in the High Court, the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be

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claim to the county court. By the terms of the section an order can only be made "if the whole or part of the demand of the plaintiff be contested." Here this was not the case, for the plaintiff had discontinued the action. Lord Esher, M.R., in his judgment in *Curtis* v. *Stovin* (1), treats the existence of a claim by the plaintiff as a condition precedent to the right to an order under this section. Its terms are similar to those of s. 26 of the County Courts Act, 1856, under which it was held in *Mackay* v. *Bannister* (2) that an action involving a counter-claim could not be remitted to a county court for trial.

Firminger, in support of the rule. The order was rightly made. The counter-claim was part of the action, and could be remitted as such under s. 65, notwithstanding the discontinuance.

A. L. SMITH, J. I am of opinion that there was no jurisdiction to make this order. I give this decision solely with reference to the facts of this case in which the action had been discontinued by the plaintiff before the date of the application. I think that the conditions indicated in s. 65 must exist before an order can be made under it, and that one of these conditions, "if the whole or part of the demand of the plaintiff be contested," cannot be regarded as existing after the discontinuance of the action by the plaintiff. The rule will therefore be discharged.

GRANTHAM, J., concurred.

Rule discharged.

Solicitors for plaintiff: *Perkins & Sawyer.*
Solicitor for defendants: *The City Solicitor.*

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tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly, &c., and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein."

(1) 22 Q. B. D. 516.

(2) 16 Q. B. D. 174.

H. D. W.

[IN THE COURT OF APPEAL.]

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April 11, 13, 15.

LEVASSEUR AND ANOTHER v. MASON & BARRY, LIMITED.

Practice—Judgment Creditor—Receivership Order, Effect of—Date from which Receivership Order takes effect.

The respondents recovered judgment for a sum of money against a foreign company carrying on business in France. Goods belonging to the company being, at the date of the judgment, in the possession of a firm in England who had a lien upon them; the respondents obtained in chambers, ex parte, an order appointing a receiver of the company's interest in the goods, and directing that any money received by him should be paid to the respondents in satisfaction of their debt. Shortly after the receivership order was made the company was adjudicated by a French Court to be in judicial liquidation, and the appellants were appointed liquidators. Subsequently, the appellants having claimed to be entitled to the goods, under orders made by the Queen's Bench Division, the goods were sold; the lien was paid off; the balance in the hands of the receiver was paid into Court, and an issue was directed to try whether the appellants or respondents were entitled to such balance:—

Held, affirming the judgment of Day, J., at the trial of the issue, that, assuming that by the law of France the appellants became entitled to the goods at the date of the liquidation, yet the receivership order had the effect of entitling the respondents to the goods, or the proceeds of them, as and from the date upon which it was made, subject only to the discharge of the lien which was a legal impediment to execution, and, therefore, that the respondents were entitled to the balance paid into Court.

APPEAL from a judgment of Day, J.

On April 4, 1889, the present defendants, Mason & Barry, Limited, obtained judgment in the High Court of Justice against the Société Industrielle et Commerciale des Métaux, a company carrying on business at Paris, for a sum of 42,090*l.*, being the invoice price of a cargo of copper sold and delivered in England by Mason & Barry, Limited, to the French company under a contract for the sale and delivery, by forward deliveries, to the company of the whole of Mason & Barry's shipments of copper to arrive from Portugal during the years 1888, 1889, and 1890.

The copper in question was, at the date of the judgment, in the hands of the Tharsis Sulphur and Copper Company, Limited, at Newcastle-on-Tyne, to whom it had been delivered by the

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French company for smelting, and the Tharsis Company claimed to be and were entitled to a lien upon it for the cost of smelting On April 8, 1889, Mason & Barry, Limited, obtained, ex parte, from Mathew, J., at chambers, an order appointing a receiver to receive their interest in the copper in question in the possession of the Tharsis Company. That order provided that the appointment was to operate at once, and to be without prejudice to the rights of any prior incumbrancers upon the goods, who might think proper to take possession of or receive the same by virtue of their respective securities; or, if any prior incumbrancer was in possession, then without prejudice to such possession, and that the receiver should at such times as might be ordered by the master leave and pass his accounts, and should pay the balance or balances appearing due on the accounts so left, or such part thereof as should be certified as proper to be so paid, such sums to be paid in or towards satisfaction of what should, for the time being, be due in respect of the judgment signed on April 4, 1889, and that the balance (if any) remaining in the receiver's hands after making the several payments directed by the order should forthwith be paid by the receiver into Court to the credit of the action subject to further order.

On April 15, 1889, the Société Industrielle et Commerciale des Métaux was, by an order of the Tribunal of Commerce of the Seine at Paris, adjudicated to be in judicial liquidation, and the present plaintiffs were appointed liquidators thereof.

On May 14, 1889, an application of the liquidators to set aside the order of Mathew, J., made on April 8, 1889, was dismissed by a Divisional Court (Mathew and Grantham, JJ.), but the order appealed from was varied by directing that the receiver should not pay out anything received under it without the direction of the Court. The order of the Divisional Court was affirmed on appeal to the Court of Appeal.

On July 2, 1889, the liquidators served a notice upon the receiver that they claimed to be entitled to the property and interest of the Société des Métaux in the parcels of copper which he was appointed to receive by the order of April 8, 1889, and that the liquidators required him not to sell, part, or deal with the same, or any part thereof, without notice to them.

On August 12, 1889, Wills, J., at chambers, made an order that the Tharsis Company be at liberty to sell so much of the goods in their hands as might be necessary to cover their claim, and that the receiver be at liberty to sell the residue of the said goods at his discretion, without prejudice to the claim and rights of the liquidators.

The copper in question was sold accordingly, and the proceeds, after deducting the amount due to the Tharsis Company, were paid to the receiver, and by an order of January 31, 1890, the balance remaining in the receiver's hands, after his costs and charges, was ordered to be paid into Court, and an issue, in which the liquidators were the plaintiffs and Mason & Barry, Limited, were the defendants, was directed to be tried in the High Court by a judge without a jury, the question to be tried being whether the liquidators or Mason & Barry, Limited, were entitled to the amount of the balance received by the receiver.

Day, J., at the trial gave judgment for the defendants in the issue, and the plaintiffs appealed. (1)

(1) At the trial of the issue evidence was given with regard to the effect of a judicial liquidation according to the French law. It would appear from that evidence that such liquidation at any rate gives the liquidators a right of disposition over all the chattels personal—whether in France or in a foreign country—belonging to the debtor at the date of the liquidation; but, as the judgment of the Court of Appeal proceeded on the view that, assuming this to be so, the receivership order obtained prior to the liquidation entitled Mason & Barry, Limited, as from the date of the receivership order, to the copper in the hands of the Tharsis company subject to their lien, it is thought unnecessary to set out the evidence in this report. Evidence was also given that by the French law nothing in the nature of execution could prevail against the title of the liquidators unless the proceeds of the execution had actually come into the hands of the judgment creditor; further, that the appointment of the receiver constituted a "nantissement" within the meaning of that word in the French code, and that all "nantissements" are void as against the title of the liquidators if they are created within ten days before the liquidation; and further, that if a creditor presents a proof in the liquidation (as Mason & Barry, Limited, had done in the present case for their whole debt) it is irrevocable, and operates as a waiver of the creditor's right to enforce any securities he may hold. Day, J., however, found upon the evidence given before him that the French law in these respects was not as the witnesses alleged, and the Court of Appeal declined to interfere with his decision. It is therefore thought unnecessary to include in the report the discussion upon or judgments given with respect to these questions of fact.

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Sir Horace Davey, Q.C., and *Kennedy, Q.C.* (*H. Tindal Atkinson*, with them), for the plaintiffs. The receivership order, which was made ex parte, gave no priority or interest in this copper to the judgment creditors. It is really nothing but an order made to preserve the property in medio, until the rights of the parties can be subsequently ascertained. The expression "equitable execution" has now come into use, but is really inaccurate: *In re Shephard.* (1) The present procedure with regard to the appointment of receivers since the Judicature Acts, under Order L., r. 15a, must be regarded by the light of the old practice in Equity before those Acts. Where there was some impediment to legal execution, as, for instance, in the case of a writ of elegit, where the interest of the judgment debtor was only an equity of redemption; or in the case of a fi. fa., where goods could not be taken because in possession of a third party who had a lien, equity would give relief. In such cases a bill was filed by the judgment creditor, who prayed that the interest of the judgment debtor might be realized, and the proceeds applied in satisfaction of the judgment debt. An interlocutory application was then made in the suit for the appointment of a receiver, whose duty it was merely to receive and preserve the property in medio; but it was not until the hearing of the suit, when all parties were before the Court, that the order to sell and apply the proceeds was made. Till then the judgment creditor obtained no right or interest in respect of the property: *In re Shephard.* (1) All that the Judicature Act has done is to dispense with the necessity for a separate suit in such cases. But the effect of the receivership order is not altered. It only has the same effect as the old interlocutory order, and does not create any lien or charge on the property, and gives no right to any one. It cannot be that an order of this sort, made ex parte, can affect the property in the goods. It was held in *In re Dickinson* (2) that a receivership order did not make the judgment creditor a secured creditor; and, the goods not having been sold before the bankruptcy of the judgment debtor, the title of the trustee in bankruptcy must prevail. A jus tertii—viz., the title of the liquidators—intervened before any order was made for the application of the pro-

(1) 43 Ch. D. 131. (2) 22 Q. B. D. 187.

ceeds of the copper to the judgment debt. The English law, having regard to the comity of nations, gives effect to the title of the liquidators in the French liquidation: *Solomons* v. *Ross* (1); *Sill* v. *Worswick* (2); Story's Conflict of Laws, s. 403, et seq.; *Jollet* v. *Deponthieu* (3); *Neale* v. *Cottingham.* (3) The evidence given at the trial of the issue, shews that by the law of France the judicial liquidation gave the liquidators a right of disposition over all the chattels personal of the company, whether in France or in a foreign country, for the purpose of distribution amongst all the creditors. [They also cited Judicature Act, 1873, s. 25, sub-s. 8; Order XLII., r. 28; Order L., rr. 6 and 16.]

Finlay, Q.C. (*Sir C. Russell, Q.C.,* and *Hollams,* with him), for the respondents, was not required to argue.

LORD COLERIDGE, C.J. In this case the question before us is, in my opinion, to be determined by English law alone. The receivership order must be taken to have been an ascertainment or decision by the Court that, at the date upon which the order was made, the present defendants in the issue were entitled to the money in respect of which it was to operate. It was an order to pay, though it was afterwards varied by the Divisional Court, whose decision was affirmed by this Court. Now, a receivership order has been called a step or process of equitable execution. Using language which, to my mind, is plainer and less likely to mislead, I should say that it is an order which shews that, in the judgment of the Court, the person obtaining it would be entitled to execution, but that from some legal impediment execution cannot be had. It ascertains that, but for that legal impediment, the person who obtains it would be entitled to the money or subject-matter upon which the order is to operate. Here the receivership order was made before the liquidation in France took place. The present defendants who obtained the order could not have execution upon their judgment, because the property upon which the order operated was in the hands of persons who had a lien upon it. The property itself, therefore, could not be taken in execution; but the right to get execution upon it, when all legal impediments were

(1) 1 H. Bl. 131. (2) 1 H. Bl. 665. (3) 1 H. Bl. 133.

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removed, was ascertained by the receivership order. The liquidation in France took place within ten days from the making of the receivership order. If no question with respect to the liquidation in France had arisen, it is perfectly clear that the receiving order, on the lien being discharged by payment, would operate, and the present defendants would have been entitled to execution, and the proceeds of execution, upon the copper which was made the subject-matter of the execution. If so, it follows that, at the date of the receivership order, the present defendants had a right to execution upon the copper, subject to the legal impediment of the Tharsis Company's lien. When the lien was paid off, the legal impediment was removed. The defendants' right to the copper is ascertained to have been complete at the date of the receivership order, and it follows that the judgment of Day, J., must be affirmed.

LORD ESHER, M.R. In this case Mason & Barry, Limited, by the judgment they obtained against the French company, became entitled, as judgment creditors, to put a fieri facias into the hands of the sheriff; and, if there was nothing else in the way, to actually get possession of this copper by means of the execution. But the copper was in the hands of the Tharsis Company, an English company, who had a lien upon it, and had therefore the right to keep possession of it. The sheriff, therefore, could not seize it out of their hands. That was the difficulty in his way. Now, formerly the judgment creditors, under such circumstances as these, would have gone to the Court of Chancery, and would have said, "There is a difficulty—a fact existing which prevents us getting the execution to which we should be entitled at common law. Will you assist us to get that which belongs to us subject to the lien? We cannot get it by the sheriff's execution, and we require a process which will enable us to get it otherwise." The process adopted by the Court of Chancery was to make a receivership order and appoint a receiver. The receiver could not, of course, get the goods until the lien was satisfied; but the moment it was satisfied he could get them. The object of the process was to remove the difficulty of the judgment creditor being unable to get possession of that to which he had a

right, and the moment the difficulty was removed to give the thing in question to the judgment creditor. That process has been called "equitable execution." In one sense it is not execution at all. It is a process which gives to the judgment creditor that to which the judgment has given him a right, and does away with the difficulty of his getting possession of it. Under the present procedure established by the Judicature Acts there is no necessity to go to the Chancery Division for this receivership order. The same Court which gave judgment in favour of the creditor, and thereby made him a judgment creditor, may make the same receivership order as the Court of Chancery made, for precisely the same reason, and to have precisely the same effect. Now, what was done under the receivership order in the present case was equivalent to this:—Disputes having arisen, by an order of the Divisional Court the receiver was directed to pay into Court the balance of the proceeds of sale of the copper after the receiver had got the money, and the lien was paid off. The receiver has had the money. Then there was an order directing an issue to be tried in the High Court by a judge without a jury. The question to be tried in that issue was whether Mason & Barry, Limited, or the liquidators of the Société des Métaux were entitled to the amount of the balance. The receiving order was made on April 8, 1889. On April 15th the Société des Métaux was adjudicated in France to be in judicial liquidation. It was contended on behalf of the liquidators that the copper in question became theirs when the liquidation took place, and therefore that the money which represented it was theirs; that if the liquidation had arisen before Mason & Barry, Limited, had obtained a right to the property, the English Courts would have recognised the French liquidation because it was first, and because by the law of France not only the property which is in France at the date of the liquidation, but also the property which is in England goes to the liquidators in order to be distributed amongst all the creditors, and that the English Courts would have said that the liquidators were entitled to the property, and that Mason & Barry, Limited, must go in and prove in the French liquidation. On the other hand, it might have been said that, assuming all this to be true, Mason & Barry's right to the property had become absolute

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by reason of the receivership order made before the liquidation, and therefore that the liquidation can have no effect upon it. It was denied by the liquidators that the receivership order had that effect. That raises the question, What is the effect of a receivership order by English law, and from what time does it take effect? The receivership order, as I have said, has the effect of giving to the judgment creditor a right to have the property in dispute handed to him after a certain difficulty has been got rid of. When the order is made and the receiver appointed, he has nothing to do but to get rid of the difficulty, and then to take possession of the goods, or receive the money. The order may be that he shall at once take possession of the goods or receive the money, and hand over the goods or pay the money. But the Court, although it makes the receivership order—which is a positive order that the receiver shall, the moment the difficulty is out of the way, hold the goods or money for the execution creditor and for him alone—may hold its hand and may say: "You, the receiver, are to receive that property, or that money, into your possession. So far as you are concerned you are to hold it for, and will have to hand it over to, the judgment creditor and nobody else. But, as it may be that some other person will come before us, or that some other point will be taken with respect to the right to the property or money, we will not at once make the order for you to hand or pay it over." If no further difficulty arises which justifies the Court in interfering further, they are bound, the moment they are satisfied of that, to order that the goods be handed over, or the money be paid over to the execution creditor. Therefore, unless the Court here come to the conclusion that the French liquidators had a right which overpowered the right of the judgment creditors, they are bound to make the order for the receiver to pay over the balance to the judgment creditors; and the moment that order is made it relates back, in my opinion, to the time when the receivership order was made, and the receivership order takes effect from that time. The receivership order is to be considered to take its full effect from April 8, 1889, which was before the date of the liquidation. The case is to be determined entirely upon English law. For the reasons I have given I am of opinion that Day, J., was right in deciding that Mason &

Barry, Limited, were entitled, as against the French liquidators, to the money which had been paid into Court. I therefore think that this appeal should be dismissed.

FRY, L.J. On April 4, 1889, Mason & Barry, Limited, recovered judgment against the Société des Métaux, and that judgment gave them a right to immediate execution against such chattel property as the Société des Métaux might have in this country. Mason & Barry, Limited, would have had under that judgment an immediate right of execution against the copper in question, had it not been for the fact that that copper was held by the Tharsis Company for a lien which they possessed in respect of it. That being the state of things, on April 8 Mason & Barry, Limited, obtained from the judge in chambers an order appointing a receiver of the interest of the Société des Métaux in the copper in question. That order included a direction that any moneys received by the receiver should be paid by him to Mason & Barry in or toward satisfaction of their debt—I say to Mason & Barry because although their names are not expressed as the payees, it is impossible to read the order and not to see that that is the meaning of it. Now that order was subsequently amended by the Divisional Court on May 14, by in effect, as I read it, striking out the order for payment to Mason & Barry, Limited, and directing that no payment should be made until the further direction of the Court was given. It is quite true that down to the present time no further direction of the Court has been specifically given, but the question is whether that direction to pay ought not to be given, because if it ought to be given, the Court must deal with it as though it had been given. Now it is not contended that as things stood on April 8, Mason & Barry, Limited, had not a perfect right to this receivership order, and to the payment of the money which might be received by the receiver under it. It appears to me to make no difference that this is a proceeding by a receivership order made in the action instead of under the old proceedings in Chancery. I think that then, as now, an order for a receiver was only made in the event of the plaintiff proving a primâ facie title to execution against the goods in question, and proving that primâ facie title as of the day when

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the receiver was appointed; and, although the old practice required that the cause should be brought to hearing, and that a direction should then be given as to the money which the receiver might have received, the Court went back to the date when he was appointed, and considered who at that time was entitled to the moneys—in other words, who at that time was entitled to execution. I cannot conceive that, as between the plaintiff and defendant in such a Chancery suit, there was any other question than the question, who was entitled at the time of the appointment of the receiver? Now it is not disputed that by the English law Mason & Barry, Limited, were entitled to execution upon the copper in question, but for the legal impediment of the lien. It follows that they were entitled in equity to the money which was the fruit of those goods as and from the date of the receivership order. I think that it makes really no difference in this case that the order, as varied by the Divisional Court, does not direct payment. I quite agree with the argument of Sir Horace Davey that until the order for payment is made the receiver merely holds the property "in medio" as between the parties to the action; but when we come to determine their ultimate rights we must have regard to whether or no the plaintiff had, at the date of the appointment of the receiver, a right to execution. If he had, he is entitled to the moneys. If he had not, he is not entitled to the moneys. That is how the matter strikes me, and I think, therefore, that this appeal fails.

Appeal dismissed.

Solicitors for appellants: *Murray, Hutchins, & Stirling.*
Solicitors for respondents: *Hollams, Sons, Coward, & Hawksley.*

W. A.

[IN THE COURT OF APPEAL.]

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May 4.

HEINEMANN & Co. *v.* S. B. HALE & Co.

Practice—Service of Writ—Action against Foreign Firm—Issue of Writ in Firm name—Service on Partner Resident within Jurisdiction—Order IX., r. 6; Order XI.

A writ was issued against a foreign firm in respect of the breach of a contract made and to be performed in England. The writ was issued in the firm name, and was served on one of the three partners who was resident in England, the other two residing out of the jurisdiction. On an application, before appearance, by the partner who was served to set aside the writ and service:—

Held (reversing the decision of the Queen's Bench Division), that the partners resident abroad could only be brought in by leave under Order XI.; that a writ in the firm name was not available against them, and that, consequently the writ must be set aside.

APPEAL from the decision of the Queen's Bench Division refusing to set aside the writ of summons in the action and service thereof.

The action was brought against the defendants to recover a sum of upwards of 46,000*l.* for moneys alleged to have been paid by the plaintiffs for the defendants at their request, for moneys lent by the plaintiffs to the defendants, and for interest and commission. The defendants, S. B. Hale & Co., were a firm carrying on business at Buenos Ayres in the Argentine Republic; the firm consisted of three partners, all of whom were foreigners, two being Argentine citizens, while the third, Sanford, was an American citizen. Two of the partners lived at Buenos Ayres, and were domiciled there, but Sanford had resided for between two and three years in England, living in a house in London with his family. Sanford also occupied two rooms in the city of London as offices, and transacted business there with the aid of two clerks; but neither his own name nor that of the firm appeared there, and it was alleged by him that the rooms were not let to him, but were merely rooms in the offices of the Buenos Ayres Water Company, which he was allowed to make use of. The contracts out of which the present action arose were negotiated by Sanford in London on behalf of his firm, and under them, certain accommodation bills were accepted in London

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by the plaintiffs for the accommodation of the defendants, who were to supply the plaintiffs with funds in London to enable them to meet the bills before they became due. The writ was issued against the firm, and was served in England on Sanford, who, without appearing, took out a summons to set aside the writ and service, on the ground of irregularity, which summons was referred by a judge at chambers to the Court.

March 5. *Finlay, Q.C.*, and *Danckwerts*, for the defendant Sanford. The case is governed by the decision in *Western National Bank of New York* v. *Perez, Triana & Co.* (1), where in an action against a foreign partnership the service of the writ upon an alleged partner who was temporarily in England, was held not to be a good service upon the firm; the only distinction being that, in the present case, the partner served is permanently and not merely temporarily resident within the jurisdiction; but that is not a sufficient distinction in principle to affect the rights and liabilities of persons residing out of the jurisdiction. The ratio decidendi in that case was, that under the guise of suing a firm a plaintiff is really suing each individual partner, and that as by virtue of Order IX., r. 6, service on one partner is service on all, the effect of applying that rule to foreign firms would be to allow service on persons out of the jurisdiction without having recourse to the procedure prescribed by Order XI. The decision in *Russell* v. *Cambefort* (2), that a foreign partnership which also carries on business in this country, cannot be affected by service of a writ on their manager here, is also applicable to the present case, for Sanford is only the manager of the English branch of this foreign business. It is true that in the recent case of *Shepherd* v. *Hirsch* (3), it was held that service on one partner within the jurisdiction was good service on all the partners, although the partnership was a foreign partnership and all the partners were resident and domiciled out of the jurisdiction; but that decision is treated in the judgment of Bowen, L.J., in the *Western National Bank Case* (1), as one that ought not to be followed.

(1) [1891] 1 Q. B. 304. (2) 23 Q. B. D. 526.
(3) 45 Ch. D. 231.

Bigham, Q.C., and *H. Tindal Atkinson*, for the plaintiffs. The important question is one of fact. This is not a foreign firm, but an English one carrying on business in this country, where one of the partners is permanently resident, and enters into contracts in the name of the firm.

[CHARLES, J. I am not satisfied that this is not a foreign firm.]

It may be so, but it is an English one, too.

Even if the defendants are a foreign firm, there is an obvious distinction between this case and that of the *Western National Bank of New York* v. *Perez, Triana & Co.* (1); there the contracting parties were wholly resident abroad, which is not the case here; and further, in that case the contracts sued upon were foreign contracts, whereas here the contract was made in London, and the money was lent and was to be repaid in London. The ratio decidendi of that case suggested by the other side, that persons outside the jurisdiction are not to be affected by a writ issued in the firm name, cannot be right, for that would apply to the case of an English firm, one of whose partners happened to be abroad either temporarily or permanently; the real ground of that decision is that the Court was there dealing with a foreign firm, all of whose partners were resident abroad. The decision in *Russell* v. *Cambefort* (2) is not in point; the object of a writ is to give notice of pending proceedings to the persons sued, and it may well be that service on a manager would not be notice to the firm, whereas service on a partner must be.

[They also cited *Pollexfen* v. *Sibson*. (3)]

Finlay, Q.C., in reply.

Cur. adv. vult.

May 1. The judgment of the Court (Cave and Charles, JJ.) was read by

CAVE, J. This is a summons by Charles Henry Sanford, an alleged partner in the defendants' firm, to set aside the writ and service upon him on the ground that the defendants' firm is a foreign firm carrying on business abroad, and that the partners are not within the jurisdiction.

(1) [1891] 1 Q. B. 304. (2) 23 Q. B. D. 526. (3) 16 Q. B. D. 792.

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It appears from the affidavit of Mr. Sanford (which, however, is far from being as clear and distinct as it should be), that the defendants' firm carry on a business of some kind not specified at Buenos Ayres in the Argentine Republic. The firm consists of Mr. Sanford, who appears to be a British subject resident and domiciled in England (1), and two other persons not specified, who are said to be Argentine citizens resident in Buenos Ayres. Before the spring of 1889, Mr. Sanford was frequently in London on the business of the firm, but about that time he took a house in London and an office in the city, and has resided here ever since, transacting such business of the firm as may be required to be done in London.

The plaintiffs claim 46,000*l.* for money paid by them for, or lent by them to, the defendants under an arrangement made by the plaintiffs in London with Mr. Sanford, and ratified by the other members of defendants' firm. The writ against the defendants' firm was duly served on Mr. Sanford under the provisions of Order IX., r. 6.

It is contended that Order IX., r. 6, does not apply in such a case as the present, and that the only way in which the plaintiffs can sue the firm is by getting leave to issue a writ under Order XI., and serving notice of it personally on each member of the firm. Mr. Sanford's application was based on two cases, *Russell* v. *Cambefort* (2) and *Western National Bank of New York* v. *Perez, Triana & Co.* (3), both of which it is necessary to examine.

Now, it must be borne in mind that in proceedings to set aside service of a writ on a foreigner, there are two points to be considered: first, whether the Court has jurisdiction, and secondly, whether the writ has been regularly served. The orders and rules provide for the service of writs, and Order XI., as incidental to the service of a writ out of the jurisdiction, contains a statement of the cases in which our Courts have jurisdiction over a foreigner residing abroad. Considerable difficulty surrounds the consideration of the rules of private international law on the subject of jurisdiction over foreigners,

(1) It was afterwards admitted, when the case was before the Court of Appeal, that Mr. Sanford was not a British subject.

(2) 23 Q. B. D. 526.

(3) [1891] 1 Q. B. 304.

because every country claims for its own courts wider extra-territorial authority than it concedes in return to foreign tribunals. The rules of international law, if there can be said to be definite rules on this part of the subject, recognize what is called the forum of the obligation: that is to say, they recognize the jurisdiction of the country in which an obligation is to be performed to enforce its performance, even where the debtor is domiciled elsewhere, although the jurisdiction can only be made effectual if the debtor happens to be present in its territory, or possesses property there: see Westlake's Private International Law, 3rd ed. p. 206, et seq. This jurisdiction is distinctly recognised as belonging to the English Courts by Order XI., r. 1 (e), and must therefore be exercised by them in a case where the facts conferring jurisdiction are shewn to exist, provided that the writ or notice has been duly served on the defendants pursuant to the orders and rules.

I have examined the affidavit which was before the Court in *Russell* v. *Cambefort* (1), and it appears that in that case the contract sued upon was made abroad, and was to be performed abroad, and that the defendants were Frenchmen domiciled and resident in France. They had, however, an office in London, and it was contended that the plaintiff was entitled to sue them in England, because he had served his writ upon the person having the control of the partnership business in London. Now, it was necessary to prove not only that the writ had been duly served, but also and first of all that the Court had jurisdiction; and the Court held that Order IX., r. 6, was not intended to extend the *jurisdiction* of the Court, but only to regulate the mode of serving the writ where jurisdiction existed, and consequently that the Court had no jurisdiction to hear that case. It did not fall within any of the heads of jurisdiction set out in Order XI., r. 1, nor were the defendants present in England, and it would, as Cotton, L.J., observed, have been going too far to hold that the Legislature was conferring on English Courts a wider extra-territorial jurisdiction than they had ever before had by the wording of Order IX., r. 6, which purported to deal with the service of writs only.

(1) 23 Q. B. D. 526.

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The case of the *Western National Bank of New York* v. *Perez, Triana & Co.* (1), also turned on a question of jurisdiction. In that case, too, the contract sued on had been made, and was to be performed, abroad, and the defendant's firm consisted of foreigners domiciled and ordinarily resident abroad, but the writ had been served on one of the partners while temporarily in England. Now, the law of England has never expressly given jurisdiction to its Courts over all the members of a foreign firm, simply because one of them happens to be temporarily in England; and the majority of the Court, following *Russell* v. *Cambefort* (2), held that Order IX., r. 6, could not be construed to give such new jurisdiction. In both these cases if application had been made to a judge, under Order XI., to permit service of notice of the writ on any of the debtors who were abroad, the application must have been refused on the ground of want of jurisdiction.

In the case we have to deal with the contract was made in this country, and was to be performed here; and therefore, according to Order XI., r. 1 (*e*), and in consonance with the rules of international law, this Court has jurisdiction as being the forum of the obligation, and the only remaining question is whether the process of the Court has been duly served. To establish this the plaintiffs have recourse to Order IX., r. 6, not for the purpose of establishing jurisdiction, but, the jurisdiction being otherwise established, for the purpose of shewing that the writ has been duly served; and that is the very purpose for which that rule was passed. It may be said that the country in which the defendants are domiciled will not, if they do not choose to appear, recognise a judgment against them given in their absence; and this may be true, for, as we have already observed, nations do not always concede to each other the jurisdiction which they assume to exist in themselves. But even if this is so, the plaintiffs are in no different position, so far as enforcing the judgment abroad is concerned, than they would have been in if they had obtained leave under Order XI., and had served each of the defendants with notice of the writ. In that case also the foreign country will not enforce the judgment if the defendants have chosen to

(1) [1891] 1 Q. B. 304. (2) 23 Q. B. D. 526.

disregard the notice and have not appeared. In that case, as in this, the judgment could be made effective against the property of the firm in England; and, where the Court has jurisdiction and the writ has been served in the manner expressly provided for the service of writs by the rules, we do not see how we can refuse to exercise our jurisdiction or set the writ aside. The summons must be dismissed with costs.

W. J. B.

The defendant Sanford appealed.

May 4, 1891. *Finlay, Q.C.*, and *Danckwerts*, in support of the appeal. If the plaintiffs wish to make all the partners responsible, they must proceed against them by name, and obtain leave to serve those who are out of the jurisdiction. They cannot issue a writ in the firm name, and so get rid of the conditions, as to bringing in foreigners who are out of the jurisdiction, imposed by Order XI. [They cited *Russell* v. *Cambefort* (1) and *Western National Bank of New York* v. *Perez, Triana & Co.* (2)]

H. Tindal Atkinson, contrà. The plaintiffs are suing a firm carrying on business in England in respect of a contract to be performed here, and they have served a partner who, if not domiciled here, is at least resident. The decision of the majority of the Court in *Western National Bank of City of New York* v. *Perez, Triana & Co.* (2) is not applicable to this state of things, for there the contract was a foreign one to be performed abroad, and the partner who was served was merely temporarily and accidentally in England.

LORD ESHER, M.R. I am of opinion that this case is settled by authority. I still think my view, and not that of the majority of the Court, in the case of the *Western National Bank of New York* v. *Perez, Triana & Co.* (2), was right. I have no right to act upon such a supposition. My view of that judgment is, that it holds in terms that, first of all, where there is a foreign firm, you cannot use these rules of procedure against it—that you cannot issue a writ under them in the firm name. Bowen, L.J., said: "The judgment of the Court of Appeal" (that is in *Russell* v. *Cambefort* (1)) "was, however, based expressly on the view that

(1) 23 Q. B. D. 526 (2) [1891] 1 Q. B. 304.

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Order IX., r. 6, was not intended to govern writs directed against foreign firms, none of whose partners were resident or domiciled in England"; and, again: "The law as to suing and serving them will remain what it always has hitherto been, though the writ cannot, under Order IX., r. 6, be addressed against them in the foreign firm's name. The old course will be still pursued, viz., to insert in the writ the names of the partners." That seems to me to mean that where it is a foreign firm, you must not issue a writ in the firm name. But whether that is so or not, it is certainly clear from that case, that you cannot serve the writ on the foreign partners by serving one of them who is in England, and you cannot serve the foreign partners without getting leave to serve them. I should suppose it was meant by that, that even if you did get leave to serve the foreign partners, you still could not serve them by serving one of them in England. I think the decision went further, and said that the writ was irregular, even against the partner served in England, because there had been no leave to serve his partners abroad. I think that case went to that length, because the Court ordered the writ to be amended. They said that the writ was irregular, that is, irregularly issued and irregularly served; but that inasmuch as the man had appeared, he had waived the irregularity, and, therefore, they ordered the writ to be amended.

I cannot see how it is possible to decide this case in favour of the plaintiffs if one attempts to enforce, as one must enforce, the judgment of the majority of the Court in that case; and, therefore, I think this appeal must be allowed.

FRY, L.J. I also feel bound to disagree with the judgment of the learned judges in the Divisional Court.

According to my view, Order XI. is a code which determines the cases in which there may be service out of the jurisdiction either of a writ of summons or of a notice of a writ of summons. Order IX., with regard to service, was never intended in any case to remove the necessity of obtaining leave to serve a writ out of the jurisdiction, or to serve notice out of the jurisdiction, and in no way can Order IX. be made available to escape the exercise of the judicial discretion of the Court which is required under

Order XI. before a person resident out of the jurisdiction can be affected. That is my view of the relation of the two orders.

Now let it be observed that the effect of suing a firm is substantially the suing of all the members of the firm. That was explained with great lucidity by Lord Justice Lindley at the beginning of his judgment in the *Western National Bank Case.* (1) He said: "When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when the name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names."

Now supposing the plaintiffs in the present case sued the three persons who constitute the firm of Hale & Co., it will be obvious that before they could have proceeded in any way which would have given them a right in any event to judgment and execution against the property of the partners resident in Buenos Ayres, they must have had recourse to the Court and have applied for leave to issue and then to serve the writ, or to serve notice of the writ, under Order XI. and the judicial discretion must have been exercised before that writ could have issued. That is the plain result, to my mind, of Order XI. and of Order II., r. 4.

It is said that by writing the names of the three persons short —writing merely the name of the firm, instead of writing the names at large—you could then apply under Order IX., r. 6, to get service on the one who is within the jurisdiction, have that treated as equivalent to service on the two in Buenos Ayres, and get execution against their property, if you could ever find any, within the jurisdiction. The result of that would be, that everything would depend on the form in which you sued. If you sued in the name of the firm, you would avoid the necessity for the exercise of the judicial discretion; and if you sued in the names of the three partners constituting the firm, you would necessarily invoke it. In my opinion the whole scheme of the rules shews that there was no intention, in allowing actions against a firm in the firm name, to vary rights of the parties, but that it was only that the names of the partners were writ short. That is exactly the view of Lord Justice Lindley.

(1) [1891] 1 Q. B. 304.

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The observations I have made seem to me to shew that it is impossible to allow the service to be of any avail. It is of no avail against the two partners who are in Buenos Ayres, because leave of the Court has not been obtained; and it is of no avail against the defendant who is within this jurisdiction, because the plaintiffs have taken it out in such a form that, if they obtained judgment at all, it would be judgment against the assets of the firm, and therefore of the partners who are not within the jurisdiction. It therefore follows that the whole proceedings were erroneous, that the writ must be set aside, and that this appeal must be allowed.

In coming to the conclusion I have expressed, I am fortified by both the cases of *Russell* v. *Cambefort* (1), and the *Western National Bank of New York* v. *Perez, Triana & Co.* (2)

Appeal allowed.

Solicitors for plaintiffs: *Lyne & Holman.*

Solicitors for defendant Sanford: *Norton, Rose, Norton & Co.*

A. M.

C. A.
May 14.

[IN THE COURT OF APPEAL.]

DOBSON *v.* FESTI, RASINI, & CO.

Practice—Service of Notice of Writ—Action against Foreign Partnership—Order IX., r. 6; Order XI., r. 7.

The plaintiffs brought an action for a breach within the jurisdiction of a contract which was to be performed within the jurisdiction against foreign partners in the name of their firm. The partnership had neither place of business nor property within the jurisdiction, and all the partners resided out of the jurisdiction. Leave having been obtained to serve notice of the writ out of the jurisdiction, the notice was served abroad on one of the partners. The defendants did not appear, and the plaintiffs applied for leave to sign judgment for want of appearance:—

Held, that the plaintiffs were not entitled to judgment, for Order IX., r. 6, did not apply to a foreign partnership, and the service of the notice on one partner was not good service on the firm.

APPEAL by the plaintiffs against the refusal of a Divisional Court (Cave and Grantham, J.J.) to allow judgment to be signed for want of appearance against the defendants, who had been served out of the jurisdiction with notice of the writ.

(1) 23 Q. B. D. 526. (2) [1891] 1 Q. B. 304.

This action was brought by the plaintiffs, machinists at Bolton in Lancashire, against Festi, Rasini, & Co., a firm carrying on business at Bergamo in Italy, to recover the balance of the price of machinery sold and delivered by the plaintiffs to the defendants, under a contract made in England. The partners in the defendant firm were all resident in Italy, and the firm had no office or agent in England, nor any property there. The firm was sued in its partnership name. On February 6, 1891, leave was given to issue the writ and serve notice of it on the defendants.

On February 19, notice of the writ of summons was served personally at Bergamo on Rasini, a member of the defendant firm. On March 10, the time limited for appearance having expired, the plaintiffs applied for leave to sign judgment against the defendant firm, which was refused at the office on the authority of *Western National Bank of New York* v. *Perez, Triana, & Co.* (1) The Divisional Court having approved this refusal, the plaintiff appealed.

There was evidence that in a proceeding against the firm before the Italian Courts, service on Rasini as a managing member of the firm would have been sufficient.

Loehnis, for the plaintiffs. The mode of service of the writ where partners are sued in the name of the firm is provided by Order IX., r. 6. Order XVI., r. 14, provides for partners being sued in the name of the firm—the terms of this order are general, and there is nothing to shew that a foreign partnership is excluded. Rule 48 of that order has been held to apply to parties out of the jurisdiction: *Dubout* v. *Macpherson* (2); *Swansea Shipping Co.* v. *Duncan* (3), and by parity of reasoning, rule 14 applies to them. Order XI., r. 7, provides for service of notice of writ on defendants abroad, and says it shall be served in the manner in which writs of summons are served. This sends us back to Order IX., r. 6, and service such as has been effected here is sufficient service. Rule 8 of that order applies to a corporation resident abroad: *Scott* v. *Royal Wax*

(1) [1891] 1 Q. B. 304. (2) 23 Q. B. D. 340.
(3) 1 Q. B. D. 644.

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Candle Co. (1) The case of *Russell* v. *Cambefort* (2) does not govern the present, for in that case there was no leave to serve out of the jurisdiction.

[KAY, L.J. You have to satisfy us that it was not there decided that Order IX., r. 6, does not apply to a foreign firm.]

The judgment of Fry, L.J., in that case is in favour of the plaintiff. The point of the case was whether Order IX., r. 6, extended the jurisdiction over foreigners. So in *Western National Bank, &c.* v. *Perez, Triana, & Co.* (3), there was no leave to serve out of the jurisdiction. The case was one where Order XI., r. 7, could not be called in aid.

May 14. LINDLEY, L.J. This is an appeal by the plaintiffs from the refusal of a Divisional Court to allow the plaintiffs to sign judgment for default of appearance against the defendants in an action for breach of contract. The plaintiffs are Englishmen, resident and carrying on business in England; the defendants are Italians, resident in Italy, and carrying on business in partnership there, and have no place of business here and no agent here. They are sued in the name of their firm. Leave was given to the plaintiffs to serve them with notice of the writ. I do not say that it was wrong to give this leave, for the firm might have appeared, and I do not say that if they had done so the proceedings would not have been regular. But Order IX., r. 6, does not apply to a foreign firm so as to make a service, which can only be valid by force of that rule, effectual against the firm, unless it appears. I consider this to be settled by *Russell* v. *Cambefort* (2), and *Western National Bank of New York* v. *Perez, Triana & Co.* (3) It is urged that this case is distinguishable, because in neither of those cases was there any leave to serve abroad under Order XI. That is true, but it does not seem to me to help the case if the firm does not appear. How did matters stand before the Judicature Acts? There was no jurisdiction to sue a foreign firm in the name of the firm. The Court has no inherent jurisdiction over any one resident abroad *Cookney* v. *Anderson* (4), and only a limited jurisdiction was

(1) 1 Q. B. D. 404.
(2) 23 Q. B. D. 526.
(3) [1891] 1 Q. B. 304.
(4) 1 De G. J. & S. 365.

given by statute: *Drummond* v. *Drummond.* (1) To construe Order IX., r. 6, in the wide way now contended for, would not be against the letter of the rule, but would be against the principles of international law. It would be monstrous to allow a plaintiff, after serving only one member of a foreign firm, to obtain by default a judgment which would bind all the partners. They might be resident in other parts of the world, and have no opportunity of defending themselves. That the Italian law allows such a mode of service in proceedings before the Italian Courts appears to me to be nothing to the purpose. I think, therefore, that although the letter of the rule is in favour of the contention of the plaintiff, still, having regard to principle, there is no jurisdiction to allow judgment to be signed.

LOPES, L.J. I also think that Order IX., r. 6, has no application to a firm not domiciled in this country, unless it enters an appearance. The defendant firm in the present case has no place of business here, has no property here, and has not entered an appearance. In those circumstances Order IX., r. 6, does not apply, as was held in *Russell* v. *Cambefort* (2), and *Western National Bank of New York* v. *Perez, Triana & Co.* (3) A distinction is taken on the ground that here leave had been given to serve the firm abroad, but that cannot help the case unless the firm enters an appearance. Before the Judicature Acts there was no jurisdiction in a case like this, and the rules made under those Acts cannot extend the jurisdiction in the way suggested.

KAY, L.J. I am of the same opinion. It is an important question how far the lex fori applies to a foreigner not resident here. If he sues here, he must, of course, conform to the practice of our Courts, but the case is different when he is sued. If he is sued for a breach of contract committed here, or in respect of land here, and appears, the Court has jurisdiction over him; but he should be personally served and appear. The defendant firm in the present case is a foreign firm, with no place of business here and no property here; it is absolutely foreign. The partners have committed a breach of contract in this country, and so, it is

(1) Law Rep. 2 Ch. 32. (2) 23 Q. B. D. 526.
(3) [1891] 1 Q. B. 304.

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argued, have brought themselves within Order XI. Then, it is said, that there being jurisdiction over them, rule 7 of that order provides that notice of the writ shall be served on them in the manner in which writs of summons are served, and so far, on the face of the rules, there is much to be said in favour of the plaintiffs' contention. But here the firm is sued in the firm's name, and leave has been given to serve the firm, and service has been effected only on one member of the firm. It is said that Order XI., r. 7, when looked at along with Order IX., r. 6, which makes service upon one of the partners sufficient service where partners are sued in the name of the firm, makes this service sufficient. But was Order IX., r. 6, intended to apply to a foreign firm? In *Russell* v. *Cambefort* (1) the question arose. In that case there was a firm of foreigners resident out of the jurisdiction, which had a place of business here and a manager here. There was no breach of contract within the jurisdiction, and therefore Order XI. did not apply, but as they had a place of business and a manager here, it was sought to sue them by service on the manager at the place of business, which is authorized by Order IX., r. 6. It was held that the rule did not apply to foreigners. Cotton, L.J., said: "No doubt the rule in question is made under the authority of an Act of Parliament, and that has been relied on as giving it as great an effect as an Act of Parliament; but although an Act of Parliament can give jurisdiction to the Court against British subjects, as to foreigners Parliament has not and does not assume to have jurisdiction against those who are residing abroad, and have not submitted to the jurisdiction of the English Courts. Therefore, in construing the rule we must have regard to what Parliament has the power to do, and in my opinion we should be wrong in construing it as giving jurisdiction against those who are in no way subject to the English Parliament; and though the rule does authorize service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships, the members of which, either by their nationality or residence, have become subject to English law and the power of Parliament. Looking at it in that view, I do not think the rule applies to

(1) 23 Q. B. D. 526.

firms of foreigners who have in no way become subject to the English Parliament." The service, then, was held to be wrong because Order IX., r. 6, did not apply to a foreign firm. This was followed in *Western National Bank of New York* v. *Perez, Triana & Co.* (1), where Bowen, L.J., says, "*Russell* v. *Cambefort* (2) was a case which arose under the same rule and order, though the service in that case was effected not on a partner but a manager of the partnership business. The judgment of the Court of Appeal was, however, based expressly on the view that Order IX., r. 6, was not intended to govern writs directed against foreign firms, none of whose partners were resident or domiciled in England." Unless we are prepared to overrule these two decisions we must hold that Order IX., r. 6, does not apply to the present case, and Order XI., r. 7, cannot cure the defect. It would be a strong thing to say that rules which were meant to deal with British partnerships shall apply to a firm domiciled and whose members are resident abroad, and enable the plaintiff, by serving one partner abroad, to sign judgment against the firm. Unless the words of the rule are plain to that effect, we ought not to put such a construction upon them.

Appeal dismissed.

Rowcliffes, Rawle & Co., for *Fullager & Hulton, Bolton.*

H. C. J.

(1) [1891] 1 Q. B. 304. (2) 23 Q. B. D. 526.

1891
April 14.

BURT AND ANOTHER v. GRAY AND OTHERS.

Landlord and Tenant—Lease—Covenant to Repair—Ejectment for Breach—Relief against Forfeiture—Underlessee of part of Premises—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

The provisions of s. 14 of the Conveyancing and Law of Property Act, 1881, enabling the Court to grant relief to lessees against forfeiture for breach of covenant, do not enable an underlessee of a part of the demised premises to obtain relief for breach of a covenant to repair contained in the head lease.

ACTION of ejectment to recover twenty-four houses for breach of covenant to repair. The defendant, who was underlessee of a part of the property comprised in the lease, took out a summons under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, for relief against the forfeiture.

A. L. Smith, J., referred the matter to the Court.

Gaskell, in support of the summons. By the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 2, "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit." These words are wide enough to include the present case, and this view is further strengthened by sub-s. 3 of the same section, which provides that "A lessee includes an original or derivative underlessee." *Cresswell* v. *Davidson* (1), is not an authority against the defendants' contention.

A. G. M. McIntyre, for the plaintiffs. The decision which has been referred to is a conclusive authority that an underlessee of part of the premises is not within s. 14.

MATHEW, J. There are two objections to granting this application. In the first place, I concur with the opinion expressed by Kay, J., in *Cresswell* v. *Davidson* (1), that the words of s. 14

(1) W. N. (1887) 87; 56 L. T. (N.S.) 811.

of the Conveyancing Act do not affect the liability of an underlessee for breach of covenant to repair, and that such liability remains the same as before the Act. I do not think that the effect of the Act is to create any privity as between the original lessor and the sub-lessee which did not exist before. The other point is this. It is contended in support of the application that the use of the indefinite article in the Act, the words of s. 14, sub-s. 3 being "a lessee includes an original or derivative underlessee," shews that it was intended to include all underlessees, and therefore that the provisions of the section apply to a sub-lessee of a part of the demised property. But the Act does not say so, and contains no provisions which ought to lead us to give it that meaning. It would be extremely difficult to say how relief could be equitably given in such a case, and I should expect to find specific directions in the Act if the rights of the lessor were intended to be interfered with in favour of a sub-lessee of part of the demised premises. I am of opinion that the application must be refused.

VAUGHAN WILLIAMS, J., concurred.

Application refused.

Solicitor for plaintiffs: *J. E. Shearman.*
Solicitors for defendants: *Tatham, Oblein, & Nash.*

P. B. H.

1891
Feb 9.

ATTORNEY GENERAL v. LOGAN.

Local Government—Nuisance—Smelting Works—Right of Local Board to sue as Owners of Property affected—Right of Local Board to act as Relators in respect of Public Nuisance—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 334.

A local authority may act as relators in an action brought by the Attorney-General for the purpose of abating a public nuisance, and may themselves maintain an action for damages for a nuisance affecting property of which they are the actual owners.

The provision in s. 334 of the Public Health Act, 1875, that nothing in that Act shall extend to certain businesses therein specified, exempts their proprietors only from the liabilities created and penalties imposed by that Act, and does not relieve them from liability for a public nuisance in a suit brought by the Attorney General for its abatement, nor from their ordinary common law liability to an owner whose property is injuriously affected by it.

ARGUMENT of a point of law arising upon the pleadings.

The action was to restrain the defendants, the owners and workers of certain copper-smelting works at Birkenhead, from causing a nuisance by noxious and offensive smells and vapours, which were alleged to be emitted from their works, and to be injurious to health and destructive to vegetation; it was brought by the Attorney General at the relation of the Wallasey Local Board, the local board being joined as co-plaintiffs; the claim of the latter was as owners of a park near to the defendants' works, the trees, shrubs, plants, and flowers in which were alleged to have been injured. The claim was for an injunction to restrain the defendants, their servants, agents, and workmen, from carrying on, or permitting the works to be carried on, in such a manner as to be or create a nuisance, or to be injurious to the public, or to the plaintiffs the local board; and there was a further claim by the local board for damages on account of the loss sustained by them as owners of the park.

The defence, after traversing the allegations in the statement of claim, and setting up a right by twenty years' uninterrupted user, proceeded, in par. 8, as follows: "The plaintiffs, the said local board, are an urban sanitary authority acting under the powers conferred by the Public Health Act, 1875, and the alleged smells, vapours, and smoke (if any, which is denied) are created

and emitted from the said works in the smelting of ores and minerals, within the meaning of s. 334 of the said Act, and not otherwise; and the defendants will, if necessary, object that the plaintiffs are not entitled to institute or maintain the proceedings." The point of law raised in this paragraph now came on for argument. For the purposes of the argument, certain admissions were made by the plaintiffs, which were shortly as follows: (1.) That the plaintiffs were a local board under the Public Health Act, 1875; (2.) that the local board had the sole conduct of the case of the plaintiffs so far as the claim of the local board was concerned, and also had conduct of the case of the Attorney General on his behalf, and that, subject to the control of the Attorney General, the local board was responsible for costs; (3.) that the smells, vapours, and smoke were emitted from the defendants' works in the smelting of ores and minerals; and (4.) that the injunction claimed would interfere with the process of smelting as carried on in the defendants' works.

BENGAL SECRETARIAT LIBRARY

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), various powers of dealing with nuisances are given to local authorities, and by s. 334 it is enacted that "Nothing in this Act shall be construed to extend to . . . the smelting of ores and minerals . . . so as to obstruct or interfere with any of such processes respectively."

Henn Collins, Q.C., and *J. W. Mansfield*, for the defendants. This action is not maintainable, either by the local board in respect of any private damage, or by the Attorney General at their relation in respect of any public nuisance. The local board is a corporation coming into existence under statute, and in its corporate capacity is invested by statute with special powers for certain specified purposes, and its rights in respect of nuisances are confined to the right to take the special proceedings mentioned in the Act. Smelting works being excepted by s. 334 from the operation of the Act, the local board have no rights which they can enforce against the defendants.

[VAUGHAN WILLIAMS, J. Have they not, as owners of the park, the same right of action in respect of a nuisance damaging their property that a private owner would have?]

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No; they are only owners quâ local board and for the purposes of a local board, and being debarred from taking proceedings as a local board, they cannot sue as private owners.

[WILLS, J. If the local board occupied offices which were injured by a nuisance, or by a subsidence caused by mining, would they be debarred from taking proceedings?]

Yes; that is the effect of what the legislature has enacted.

[VAUGHAN WILLIAMS, J. A very good reason for providing in s. 334 for an exemption from summary proceedings is that the summary proceedings are the creature of the statute; but there seems no reason why the local authority should not exercise common law rights as owners.]

The special statutory powers conferred on them afford a good reason for debarring them from the exercise of the ordinary common law remedies. The want of interest in the local board prevents them from acting as relators; and, as they are so debarred, the Attorney General cannot proceed at their relation, and the action altogether fails.

Bigham, Q.C., and *Joseph Walton*, for the plaintiffs. Admitting that in its corporate capacity the local board could not sue at common law in respect of nuisances affecting the rights of the public, they are not thereby precluded from acting as relators and setting the Attorney General in motion. In proceedings taken by the Attorney General at the relation of other parties it is unnecessary that the relator should have any interest in the subject-matter; the only object of inserting the name of a relator is to make him responsible for the costs of the proceedings. As regards the claim by the local board as owners of the park, the mere fact that they are a corporation created by statute and having certain special statutory powers cannot deprive them of the ordinary proprietary rights of owners.

Mansfield, in reply.

WILLS, J. This is a matter which presents some little difficulty, not so much from the nature of the case itself, but because it deals with matters with which we are not so familiar as the judges of the other Division of the High Court. The principal point in the case has been very clearly put, but we have not

had any authorities brought to our notice in the course of the arguments.

The complaint of the prosecutor in the present case may be divided into two branches; it is a combination of a public information by the Attorney General in his capacity as representing the Crown, in which he takes proceedings with regard to the interest of the public generally, and of a common law action brought by owners of property in respect of a nuisance damaging their property. With regard to the public matter, it is said that a corporation exists only for certain specified purposes, and that its rights in respect of nuisances are confined to the right to take the particular class of proceedings mentioned in the Act. The first question, however, here is not whether *they* have a right to come forward in the character of complainants, but whether the Attorney General in his official capacity acting on behalf of the Crown, is obliged, when it comes to his knowledge that a public wrong is being done, to hold his hand, because the information is given to him by a local board and not by any other person. It cannot be so. This is clearly a case in which the Attorney General on receiving information of the existence of the nuisance might file an ex officio information, as appears from *Attorney General* v. *Cockermouth Local Board* (1), an authority which my brother Williams has discovered during the argument. There is, in fact, no difference between an information filed ex officio by the Attorney General and a proceeding by him at the relation of a third party, except as to costs; and if I may venture to express an opinion without having any very extensive knowledge of the subject, I should say that my notion of the theory of a proceeding by information is that when once the matter is in the hands of the Attorney General it becomes substantially a public proceeding, in which the Attorney General, if there be no relator, becomes as prosecutor responsible for the costs, while if a relator is introduced, the responsibility for costs is upon the latter. There is authority for saying that a relator need not have any personal interest in the matter, except as one of the public; he need not, in fact, be himself damaged at all; and if that is so, the introduction of the relator is really only a

(1) Law Rep. 18 Eq. 172.

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matter of costs, and it is clear that the Attorney General has a right to proceed at the relation of a local board. It is true that if the argument on behalf of the defendants is correct, there might possibly be a difficulty in fixing the local board with costs; but I think that difficulty more imaginary than real, and that the sheriff would have no difficulty in levying the costs if the local board were beaten. Even if I am wrong in that supposition, the consequence would be that the Attorney General, having chosen to proceed, is none the less entitled to do so, but might possibly be liable for the costs, if the relators had exceeded their statutory authority in giving the information. I am therefore clearly of opinion that this part of the statement of claim is well founded as a matter of law.

As to the other part of the claim, I must confess to some astonishment at the argument on behalf of the defendants. The proposition contended for is that because a local board is a corporation existing for statutory purposes it has not the ordinary proprietary rights in respect of property which belongs to it. That is a very novel proposition, and it has been candidly admitted that, if it is well founded (to put an extreme case), the Corporation of Liverpool, who are the owners of St. George's Hall, would have no right of action against a private person who, in working his coal mine, undermined the hall, and let it down and destroyed it. But in such a case the Corporation have, as it seems to me, the ordinary common law rights attached to the possession of real property. Effect is given every day to such rights as well as to those attached to the possession of personal property. The mere fact that the Corporation are prevented from taking summary proceedings before magistrates in respect of a nuisance arising from smelting works, is no reason for denying to them the common law rights of an owner of property. I think, therefore, that this action is well founded in both respects—that is to say, that it is properly brought by the Attorney General at the relation of the local board, and by the local board as actual owners of a part of the property affected.

VAUGHAN WILLIAMS, J. I am entirely of the same opinion, but I will add a few words, as I think that the question is

somewhat novel, and that the answer does not depend on any authority of which I am cognisant. The question is whether either the Attorney General or the local board can maintain an action for a nuisance against the defendants, and if either of them can, the answer to the question put to us must be against the defendants. I will deal first with the rights of the local board.

The action is one for a nuisance, and the local board which makes the complaint became a corporation by virtue of the provisions of the Public Health Act, 1875. The utmost that can be said as regards its being made a corporation is, that it was made a legal entity, and that it was entitled, as long as it did nothing ultra vires, to enforce its rights in the same way as individuals are entitled to do. Now the right of an individual in respect to a nuisance is this: he may bring an action in respect of a public nuisance if he is individually injured by it.

In the present case the local board, as appears by paragraph 4 of the statement of claim, were the owners of property, consisting of a park, with the shrubs, plants, and flowers in it. If the result of a public nuisance is that the private property of a corporation is injured, of course the corporation has a right of action, and I must confess to a feeling of surprise that the defendants' counsel should have suggested that there could be an answer to that proposition. If it were not for the allegation that the local board were owners of this property, and that the property had been injured by reason of the acts of the defendants, I should have thought it extremely doubtful whether the corporation had any cause of action; for if they had no cause of action by reason of injury done to their own property, it is plain that the local board have no cause of action given to them by statute.

Now, s. 95 of the Public Health Act, 1875, confers on the local board the right to take summary proceedings for the purpose of abating the nuisance, wholly irrespective of the question of whether any private injury has been inflicted on it or not. If the question here were whether, the right to take summary proceedings being taken away by s. 334, the local board could bring an action at common law to abate the nuisance (they

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meat "unlawfully deposited for the purpose of sale and intended for the food of man":—

Held, that in order to convict the owner of an offence under the above section there must be either a sale or an exposure of the meat for sale, and that the conviction was therefore bad.

CASE stated by an alderman of the city of London, sitting at the Guildhall Police Court.

Upon the information of the respondent a summons was issued against the appellant under s. 2 of the Nuisances Removal Act, 1863, charging him with being "the person to whom did belong the carcase of a lamb and two pieces of meat, to wit, veal, which were unlawfully deposited in the London Central Meat Market for the purpose of sale, and intended for the food of man, the same being diseased, unsound, unwholesome and unfit for the food of man."

The following facts were found in the case:—

The appellant was a farmer in Northamptonshire. On October 7, 1890, a lamb and a calf belonging to him were by his order killed and prepared for sale and despatched to a salesman in the London Central Meat Market; at the time the carcases were sent to London they were unfit for human food, and the appellant was aware of their condition. The meat was despatched and deposited by the appellant's orders in the salesman's shop for the purpose of being sold and used as human food. After arriving at the meat market the meat was not exposed for sale; on being unpacked it was put on one side, and at 6 A.M. on October 8 the salesman called the attention of the respondent, the inspector, to it; the meat was taken away, and a justice's order for its destruction was made the same day.

The appellant was convicted, the learned alderman being of opinion that the provisions of the Act extended to owners depositing unsound meat for the purpose of sale, and that it was not necessary to prove an actual exposure for sale.

Toller, for the appellant. The conviction was wrong. The section does not apply to owners depositing unsound meat for the purpose of sale; it applies to two classes of persons, (1.) the owner at the time of exposure for sale, and (2.) the person on whose premises the meat is found. Depositing for sale is

merely one of the conditions precedent to the right of seizure; but sale or exposure for sale is necessary in order to bring the owner within the section. The conviction proceeded upon a misapprehension of the decision in *Mallinson* v. *Carr* (1), where it was held that the person on whose premises unsound meat was found was, under identically similar provisions in the Public Health Act, 1875, liable to be convicted, notwithstanding that there had been no exposure for sale.

[He also cited *Vinter* v. *Hind* (2); *White* v. *Redfern.* (3)]

G. M. Freeman, for the respondent. The statute aims at preventing not only the sale or exposure for sale of unsound meat intended for the food of man, but also its being deposited for sale. This meat was deposited for sale by, or by the express direction of the appellant, and it is unnecessary in order to convict the owner that there should be an exposure for sale. The meat was all the time in the appellant's control, and in his constructive possession.

DAY, J. I greatly regret that I do not see my way to uphold this conviction; it is against the public interest that a person in the country who knowingly sends unsound meat up to a London market, should escape punishment, because there has not technically been an exposure for sale. Here there was no exposure for sale, for the salesman, as soon as he saw the meat, put it aside, and called the respondent's attention to it; had he exposed it, and then called the inspector's attention, the salesman would, it is true, have himself incurred penalties, which, however, it is impossible to suppose would have been enforced, and the defendant too would have come within the language of the section. The distinction between selling and exposing and depositing for sale is well known to the legislature; it is drawn in this very section, which empowers an inspector to seize food deposited for sale, and to obtain a magistrate's order for its destruction. But when it comes to punishing, we see that the owner of the meat is not to be punished unless it is sold or exposed for sale, except in so far as he is punished by the loss of the meat; he incurs the risk of the meat being condemned and destroyed, and if it is destroyed, that is the penalty which he

(1) [1891] 1 Q. B. 48. (2) 10 Q. B. D. 63. (3) 5 Q. B. D. 15.

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pays; the legislature in dealing with this question of punishing the owner has omitted all reference to depositing for sale, and has in such a case relieved the owner of all responsibility other than that of losing his meat. It is clear that the offence charged does not come within the language of the section, and the conviction must therefore be quashed.

LAWRANCE, J. I regret exceedingly to have to say that I agree.

Conviction quashed.

Solicitors for appellant: *Brownlow & Howe, for Harding, Leicester.*

Solicitor for respondent: *E. A. Baylis.*

W. J. B.

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March 20; May 15

[IN THE COURT OF APPEAL.]

HOWLETT *v.* MAYOR, &c., OF MAIDSTONE.

Local Government—Pauper Lunatic—Expenses of Maintenance—County Lunatic Asylum — Additional Charge — Power to fix Amount of Charge—Committee of Visitors—Arbitration — 16 *&* 17 *Vict. c.* 97, *s.* 54 — *Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 62, 86.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 86, sub-s. 4: "Where at the passing of this Act a borough with a separate court of quarter sessions, not being a county borough, &c., contracts with the quarter sessions of the county in which the borough is situate for the reception of the lunatics of the borough in the asylum of the county, such borough shall, on the determination of such contract, cease to have power to build a lunatic asylum, and, subject to the enactments providing for an additional charge for the maintenance of lunatics in cases where no contribution has been made towards the cost of building and furnishing an asylum, shall be liable to contribute to the county rate of the county in respect of such lunatic asylum in like manner as the rest of the county":—

Held, that the meaning of the above clause must be taken to be that the committee of visitors of a county lunatic asylum have no longer the power which they formerly possessed, under s. 54 of the Act, 16 & 17 Vict. c. 97, of fixing the amount to be paid for the maintenance of a pauper lunatic, sent to them from a borough which has not contributed towards the cost of building and furnishing the asylum; but, in case of a difference, the borough authorities are entitled to have the amount due ascertained by arbitration under s. 62 of the Local Government Act, 1888.

APPEAL by the defendants against the judgment of Denman, J., at the trial of the action.

The action was brought by the clerk of the Kent County Lunatic Asylum against the corporation of Maidstone, to recover a sum alleged to be due to the asylum in respect of the maintenance of some pauper lunatics who were sent from Maidstone to the asylum. It was admitted that something was due, and the question was, whether, notwithstanding the Local Government Act, 1888, the committee of visitors of the asylum had power, as they had before that Act, to fix the amount to be paid by the corporation, or whether the amount must be fixed by arbitration under s. 62 of the Act. Denman, J., held that the committee had power to fix the amount. The defendants appealed.

March 20. *Channell, Q.C.*, and *R. M. Bray*, for the defendants, argued that by virtue of s. 86, sub-s. 4, of the Local Government Act, 1888, the defendants were entitled, if the parties could not agree, to have the amount due by them ascertained by arbitration under s. 62 of that Act.

Henn Collins, Q.C., and *F. Lowe*, for the plaintiff, contended that by virtue of the words in sub-s. 4 of s. 86, "subject to the enactments providing for an additional charge for the maintenance of lunatics in cases where no contribution has been made towards the cost of building and furnishing an asylum," the former power of the committee to fix the amount of the charge was preserved, and that s. 62 did not apply.

Channell, Q.C., in reply.

[The following statutes were referred to: 16 & 17 Vict. c. 97, ss. 54, 131; 25 & 26 Vict. c. 111, ss. 6, 7; 30 & 31 Vict. c. 106, s. 23; 51 & 52 Vict. c. 41, ss. 62, 86.]

Cur. adv. vult.

May 15. FRY, L.J., read the following judgment of the Court (Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J.). This is an action brought by the clerk of the Kent County Lunatic Asylum against the borough of Maidstone in that county for the recovery of a sum of money for the maintenance during the year succeeding the coming into force of the Local Government Act, 1888, of certain pauper lunatics sent from Maidstone to the asylum. That something is due to the plaintiff is not in dispute;

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the only question is as to the mode of ascertaining that amount. The question primarily turns on the true meaning of the Local Government Act, 1888, s. 86, sub-s. 4. That sub-section enacts that where at the passing of that Act a borough of the kind there described contracts with the quarter sessions of the county in which the borough is situate for the reception of the lunatics of the borough in the county asylum, such borough shall, on the determination of the contract, cease to have power to build a lunatic asylum, and shall be liable to contribute to the county rate in respect of the county lunatic asylum in like manner as the rest of the county. So far the matter is clear. But the enactment further provides that the liability to contribute to the county rate shall be subject to the enactments providing for an additional charge for the maintenance of lunatics in cases where no contribution has been made towards the cost of building and furnishing an asylum. The object of this provision is clear. If the borough were allowed to join the county, after the county had built the asylum, without contributing towards the expense of the building, it would gain an unfair advantage over the rest of the county, and this is to be avoided by maintaining in force certain enactments with regard to additional charges. Now, Maidstone was, at the passing of the Local Government Act, a borough of the kind described in the section; it had a contract with the county in respect of its lunatics, and it had not contributed towards the cost of the county asylum. The Local Government Act, 1888, contains another section which it is essential to mention—namely, the 62nd—which provides, amongst other things, that, in case of difference as to any matters requiring adjustment (including liabilities), agreements may be entered into between the parties for their determination, and that, in default of agreement, they shall be determined by an arbitrator, for whose appointment provision is made. Now, to revert to the charge as to lunatics, we must inquire what, at the passing of the Act of 1888, were the enactments in force providing for the additional charges for the maintenance of borough lunatics where the boroughs had not helped to build the asylum. The only enactments which, it appears, can be so referred to, are the Acts 16 & 17 Vict. c. 97, 25 & 26 Vict. c. 111, and 30 & 31

Vict. c. 106. The joint effect of these enactments amounted, in our opinion, to this—that the committee of visitors of a county asylum had the power to fix a weekly charge for every lunatic, and to fix, in regard to lunatics taken in from places which had not helped to build their asylum, a larger sum than for lunatics from the county; that the borough had the power to accept the rate so fixed by the visitors of the Kent asylum, or of any other county asylum willing to receive the borough lunatics, or to build their own asylum; that the visitors of the county asylum might carry the extra sum paid for foreign lunatics to a building and repair fund; that the borough had a power to defray out of the borough rate, and in exoneration of the poor's-rate, the sum which they considered to represent the extra sum, not exceeding, however, one-fourth of the entire weekly charge; that in certain cases the visitors of the receiving asylum were to transmit their accounts in respect of borough lunatics separately—that is, they were to send to the union the account for maintenance of the lunatics, and to the treasurer of the borough the account for the extra sum. The result of these enactments was to give power to the visitors of an asylum to contract to receive lunatics, and to the visitors of another county or borough to contract to send lunatics, but the borough within the geographical bounds of a county was under no obligation to have recourse to its county asylum; it might resort to any other county in England, or it might erect its own asylum. When, and only when, a contract was made, certain liabilities arose—namely, the liability on the union within the borough to pay for the ordinary maintenance of the lunatic: the liability of the borough fund to pay the extra sum for the lunatic. But everything in the nature of liability arose from contract. By the Act of 1888 all this is altered. The borough is deprived of its freedom of contract and of its power to erect an asylum, and instead it is bound to send its lunatics to the county asylum, and to pay the ordinary weekly sum for each lunatic: moreover, the enactments providing for the extra sum are still to be in force. It is obvious that the language of this last clause is not perfectly accurate, because it seems to imply that the enactments created a liability, whereas, in fact, the enactments only gave a power to contract, and

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through contract to create a liability, and this very power to contract the Act of 1888 itself destroys. But, though the language of the clause may not be precise, the real meaning is not, we think, difficult to gather: in our opinion, the effect of the language used is to create a statutory liability in the borough in respect of the extra sum, in lieu of the contractual liability which previously existed, and, consequently, the borough is still under a liability to pay to the county something more than the mere expense of the maintenance of the borough lunatics. So far it appears to us that the case is reasonably clear, and it is really not in dispute. But then arises the question—How is the quantum of this liability to be ascertained? The plaintiff says it is to be fixed by the committee of visitors of the county asylum, as it was before the Act of 1888. The defendants say it must be ascertained by agreement or arbitration under s. 62 of the Act of 1888. In our opinion, the committee of the county asylum have no longer the power to fix the amount of the extra sum to be paid by the borough. The power was given to them only as part of the machinery by which the county could contract with the borough; the resolution of the county visitors fixing the amount had by itself no binding effect on the borough; and it only became binding on the borough when they assented to it. In our opinion, the power of the committee of visitors to fix the amount perished with the power to contract, of which it was, in fact, only a part. To arrive at the conclusion that this power survived would be to construe the words in question, not as continuing an existing power for an existing purpose, but as continuing an existing power for a novel purpose, and so as to expose the borough to the possibility of an injustice against which it had lost the power of protecting itself when it was denuded of its freedom to contract with what asylum it chose. It is said, and truly, that after the Act of 1888 the borough will have its representatives on the county council, but this does not appear to us to be a sufficient answer to the difficulty. We think, therefore, that the determination of the amount of the liability of the borough for the extra sum for its lunatics is one of those matters of difference which under s. 62 must be determined between the authorities, either by agreement or by arbitration.

That has not been done in this case, and, therefore, in our opinion, the plaintiff has no present cause of action in respect of the extra sum, and the appeal must be allowed.

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Appeal allowed.

Solicitors: *Sharpe, Parker, & Co., for H. Monckton, Town Clerk of Maidstone; Kingsford, Dorman, & Co., for Hoare, Howlett, & Tatham, Maidstone.*

W. L. C.

[IN THE COURT OF APPEAL.]

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April 29.

UNWIN *v.* HANSON.

Highway—Surveyor—Cutting Trees near Highway—5 & 6 Wm. 4, c. 50, s. 65—"Lopping," Construction of.

By 5 & 6 Wm. 4, c. 50, s. 65, justices of the peace have power to order and direct that trees growing near a highway, which prejudice the highway by excluding the sun and wind therefrom, be "pruned or lopped"; and, if the owner of the trees makes default in complying with the order, the surveyor of highways for the district is authorized to "prune and lop" such trees:—

Held, that the term "lop," as used in this section, meant to cut off the branches laterally, and, therefore, that the section did not give any power or authority to the justices or the surveyor in respect of cutting off the tops of any trees.

APPEAL from the judgment of Pollock, B., at the trial of an action for trespass to land, in which the plaintiff claimed damages for the cutting and mutilation of certain trees by the defendant. The plaintiff was the owner and in possession of land adjoining a highway called Tentlow Lane, in the parish of Norwood, and the defendant was the surveyor of highways for the same parish.

On February 25, 1889, two justices of the peace of the county made an order, upon the application of the defendant, under 5 & 6 Wm. 4, c. 50, s. 65 (1) directing that certain trees growing

(1) 5 & 6 Wm. 4, c. 50, s. 65: "If the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament, or for shelter to any hop ground, house, building, or court yard of the owner thereof), growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to

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in and near the hedges in the plaintiff's lands adjoining Tentlow Lane (not being trees planted for ornament or for shelter to any hop ground, house, building, or court yard of the plaintiff) should be "pruned or lopped so that the said carriageway or cartway shall not be prejudiced by the shade thereof, and so that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof."

The plaintiff having failed to comply with this order as required by the statute, the defendant entered upon the land in question, and (inter alia) cut the tops off two fir trees, being two of the trees specified in the order. The plaintiff thereupon brought this action.

Pollock, B., at the trial gave judgment for the defendant, and the plaintiff appealed with respect to the cutting of the two fir trees.

Channell, Q.C. (*W. B. Trevelyan,* with him), for the appellant. The statute 5 & 6 Wm. 4, c. 50, s. 65 gives the justices no

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summon the owner of the land on which such hedges or trees are growing next adjoining to such carriageway or cartway to appear before the justices at a special sessions for the highways, to shew cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof, or why the obstruction caused in such carriageway or cartway shall not be removed; and the question as to the cutting, pruning, or plashing such hedges, or the pruning or lopping such trees, or the removal of such obstruction as aforesaid, shall, upon proof of the service of such summons, and whether the said owner attend or not, be determined at the discretion of such last-mentioned justices; and if such justices shall order and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left at the usual place of abode of the said owner, or of his steward or agent, and in default thereof shall forfeit, on conviction, a sum not exceeding forty shillings; and the said surveyor, if the order of the said justices is not complied with, shall and he is hereby authorized and required to cut, prune, or plash such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this Act."

power to order that the tops of trees near highways shall be cut off. The word "lop" in s. 65 is used in connection with "prune," and does not include such a power. It is a well-known term in agriculture and forestry, and it was used by the legislature in order to carry out the object of the section, which was to prevent the branches of trees extending laterally over the highway so as to deprive it of sun and wind. If it had been intended to give a power to cut off the tops of trees, the word "topping," which word has also a well-known meaning, would have also been used. The expression "lop and top" occurs in many Acts of Parliament, as for example 6 Geo. 3, c. 48, s. 1, and in 6 Geo. 3, c. 36, s. 1, which statutes dealt with wilful injuries to trees; and it is an expression commonly to be found in precedents of conveyances of real property. The General Turnpike Act, 3 Geo. 4, c. 126, s. 116, provides that owners or occupiers of land adjoining turnpike roads shall "prune or lop the branches of trees" growing in or near the fences of the road, shewing that "lop" is used in the sense contended for here, and there is no reason for supposing that the legislature intended to give a power to take off the tops of trees growing near a highway, whilst the only power with respect to turnpike roads was to lop the branches. The 5 & 6 Wm. 4, c. 50, restricts the rights of the owners of property, and the words used in s. 65 must be strictly construed according to their proper technical meaning. All the witnesses at the trial understood the meaning of "lopping" to be cutting off the branches laterally.

Kemp, Q.C. (*C. C. M. Plumptre*, with him), for the respondent. The learned Judge at the trial was satisfied that the trees in question were within the mischief aimed at by the statute, i.e., that they prejudiced the highway by excluding the sun and wind from it. It is submitted that "lop" in s. 65 is used in the popular sense of cutting off the extreme end of anything, and that includes taking off the top of a tree. In Webster's Dictionary, and in the Imperial Dictionary, to "lop" is defined as "to cut off the end of anything," and Dryden, in 'The Spanish Friar,' uses the word in the sense of cutting off the top. The technical meaning of "lop" as used in forestry ought not to be applied here. The science of forestry deals with the

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protection of the trees; here the question is with respect to the protection of the highway. The words of s. 65 are that the surveyor shall be authorized "to prune and lop such trees," and the addition of the word "lop" to "prune" shews that something more than pruning was intended. In 3 Geo. 4, c. 126, s. 116, the words are "shall prune or lop the branches," and it is significant that the words "the branches" are omitted in 5 & 6 Wm. 4, c. 50, s. 65. If the construction contended for on behalf of the appellant be correct, the object of the Act would not be attained, because there would be no power to interfere with trees which inclined over the highway and had bushy tops. In such cases the highway would be as much prejudiced as by branches extending laterally.

LORD ESHER, M.R. In this case the action is brought by an owner of land which adjoins a highway in the country, and it is brought against the surveyor of highways of the district to recover damages in respect of something done by the surveyor, which it is said he was not authorized to do, to certain trees which were upon the plaintiff's land and near the highway. The question before us now is with regard to two fir trees. The plaintiff complains that the surveyor has "topped" them—i.e., cut them off at a certain height from the ground. The plaintiff asserts that the surveyor had no right by statute so to cut them off; and, if so, he certainly had no right at common law. The surveyor's answer is that the trees were injuring the highway; that by statute he had a right to lop them, and that what he did was lopping them within the meaning of the statute. The statute, which is the Highway Act of 1835, 5 & 6 Wm. 4, c. 50, provides by s. 65 that if the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges or by any trees growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, a justice of the peace may, upon the application of the surveyor, summon the owner of the land to appear before the justices at a special sessions for the highways to shew cause why the said hedges are

not cut, pruned, or plashed, "or such trees not pruned or lopped in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun or wind may not be excluded from such carriageway or cartway to the damage thereof;" and the justices may at their discretion order and direct that the trees be "pruned or lopped" in the manner aforesaid; and if the owner makes default for ten days in complying with the order, the surveyor shall, and he is hereby authorized and required, "to prune and lop such trees for the benefit and improvement of the highway." On the one hand, it is said that the word "lop" does include cutting off the top of a tree; on the other, that it does not. If it does, the surveyor was justified in what he did; if it does not, he was not. Now when we have to consider the construction of words such as this occurring in Acts of Parliament we must treat the question thus: If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words. For instance, the "waist" or the "skin" are well-known terms as applied to a ship, and nobody would think of their meaning the waist or the skin of a person when they are used in an Act of Parliament dealing with ships. Now dealing with the cutting of trees in the country, is there not a language which all people in the country conversant with trees know and understand? It is not a question of mere forestry, but of what persons generally living in the country know and understand by the use of a particular term with respect to the cutting of trees there. Therefore, dealing with the cutting of trees in the country, this Act of Parliament uses language which everybody conversant with the cutting of trees in the country knows and understands. I think it would be mere pedantry in the present case not to take notice of the well-known meaning which

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persons in the country conversant with the cutting of trees would attach to the word used in this Act of Parliament. There was evidence given at the trial of its well-known meaning, though I think that evidence was unnecessary. Two words, "lopping" and "topping," which mean different things, are used in the country with respect to the cutting of trees. The Act gives directions with respect to cutting trees near a highway to the person who has to cut them, and to the magistrates who may order them to be cut, and uses only one of those words, namely, "lop." That word is well known in the country to mean cutting off the branches of a tree; "topping" is the cutting off its top. I think that the proper way to construe the Act, under those circumstances, is to say that it was only intended to give power to cut off the branches. That view is strengthened by looking at the Turnpike Act, 3 Geo. 4, c. 126, s. 116, which provides that the owners or occupiers of lands adjoining a turnpike road shall "prune, or lop the branches of trees, growing near thereto." There the matter is made quite clear by the addition of those words "the branches" to the word "lop." In the Highway Act the word used is "lop" only; but if we were to hold that it includes "topping," then the extraordinary result would follow that by the side of a turnpike road the branches of the trees only could be cut, whilst by the side of a highway the tops of the trees could also be cut off. I am of opinion, therefore, that the surveyor in this case had no power to cut off the tops of the trees in question, and that the judge at the trial was bound to hold him liable for so doing.

FRY, L.J. I am of the same opinion. I think it is impossible to hold that "lopping" in its ordinary sense includes taking off the top of a tree. No doubt the word "lop" where used in connection with the head of anything may mean taking off that head; but according to the ordinary use of language, lopping a tree means taking off its branches, and does not mean taking off the top of it. If it was necessary to shew that "lopping" has a technical meaning, there was abundant evidence given on the point at the trial. All the witnesses called knew that "lopping" did not include "topping"; and indeed every one

who lives in the country and has to do with trees, or who has had to draw deeds in relation to real property in the country, knows the well-marked difference between lopping and topping. Under those circumstances, if the Act of Parliament had meant to include a power to take off the tops of trees it would have used the words "lop and top" instead of the word "lop" only. Then, is there anything in the section, having regard to the mischief which it is intended to prevent, which requires the wider interpretation of the word "lopping"? It was argued that mischief to the highway might equally result from allowing the top of a tree to remain as from allowing its lateral branches to remain. It is quite true that equal mischief might so result, but I do not think that it would in the great majority of cases. In that view the legislature may well have thought fit to confine the power to cutting off the branches, having regard to the greater injury to the owner's property which would result from cutting off the top.

LOPES, L.J. The Act of Parliament we have to construe relates to country matters, and it is to be administered by surveyors of highways and magistrates in the country. It is said that we ought to give an interpretation to the word "lopping" in the Act, which will include taking off the tops of trees. I am of opinion that we cannot do so having regard to the objects of the Act. In my opinion we must give the word the ordinary interpretation which it would bear in country life. In country life two entirely distinct terms, "lopping" and "topping," are used with respect to the cutting of trees, "lopping" meaning the cutting off the branches of a tree laterally, and "topping" meaning the cutting off its top. It was argued that, the object of the statute being to prevent prejudice to the highway by the trees on either side interrupting the free access of wind and sun, we should interfere with that object by holding that there was no power to top the trees. But if the matter is carefully considered, the removal of the lateral branches would, in the vast majority of instances, give a sufficient access of sun and wind to keep the road in proper order. If the legislature intended to include a power to take off the tops of trees, one is at a loss

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to conceive why they did not use the words "lopping and topping," which words in conjunction so readily occur to one's mind in connection with the cutting of trees. I think that the word "lopping" must have its ordinary meaning as used in country life. The appeal must be allowed.

Appeal allowed. (1)

Solicitor for appellant: *Godfrey H. Pownall.*
Solicitor for respondent: *A. Lawrence Houlder.*

W. A.

Feb. 23, 24, 26.

IN RE BELLENCONTRE.

Criminal Law—Extradition—Embezzlement or Misappropriation as a Notary—Fraud by a Bailee—Fraud as an Agent—Sufficiency of Warrants of Arrest and Committal—Attorney or Agent intrusted with Money for safe Custody—Extradition Treaty with France, Article 3, *Clause* 18—*French Penal Code, Article* 408—24 *&* 25 *Vict. c.* 96, *ss.* 75, 76—33 *&* 34 *Vict. c.* 52.

In order to justify the extradition of the subject of a foreign state, there must be evidence of an act committed by him in the foreign country, amounting to an offence against the law of such country, and which if committed in England, would amount to an offence against English law.

A warrant was issued in France for the arrest of a French subject, accused of having embezzled or misappropriated money delivered to him in his capacity of notary. He escaped from France, and was arrested in English territory, and his extradition was demanded by the French authorities. A magistrate committed him for extradition on a warrant describing him as accused of the crime of fraud by a bailee and fraud as an agent. The French warrant specified nineteen separate charges. On an application for a habeas corpus, the Court came to the conclusion that as to fifteen of the charges, the evidence disclosed no crime punishable by English law. With regard to the other four charges, there was evidence that in each case money was intrusted, without any direction in writing, to the prisoner as a notary, with a view to re-investment as soon as either he or his customer should have found a suitable investment, and that he had misappropriated such money:—

Held, that the offences charged were sufficiently described, both in the French and in the English warrant, and that the warrants were consistent with each other; that the fact that, as to some of the charges in the French warrant, the evidence did not disclose any crime against English law, was no answer to the claim for extradition; that as to the four charges last above-mentioned, there was evidence of offences within the meaning of article 408 of the French

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(1) The Court of Appeal desired to consult Pollock, B., before stating what judgment should be entered for the plaintiff.

Penal Code, and article 3, clause 18, of the Extradition Treaty, and evidence that the prisoner had been intrusted as an attorney or agent with money for safe custody within the meaning of 24 & 25 Vict. c. 96, s. 76, and therefore there was evidence of offences against English law, and extradition ought to be granted:

Held, that there was no evidence of offences against 24 & 25 Vict. c. 96, s. 75, because the first part of that section requires that the money should have been intrusted with a direction in writing, and the second part does not apply to money.

A RULE NISI had been obtained on behalf of David Henri Bellencontre, a French subject, for a habeas corpus to bring up his body in order that he might be discharged from custody.

The prisoner had been committed for extradition, by Sir John Bridge, the chief magistrate at Bow Street Police Court, under a warrant, a copy of which is set out below. His extradition was demanded by the French authorities on nineteen separate and distinct charges, but as the Court, after considering the whole of the evidence, arrived at the conclusion that as to four only of the charges specified in the French warrant of arrest, numbers 3, 4, 17 and 18, the evidence set out disclosed crimes punishable by English law, with regard to which extradition could be granted, the portions of the French warrant, and the depositions relating to the remaining fifteen charges, are omitted.

The following is a translation of the French warrant of arrest, so far as it relates to the charges as to which the Court decided that extradition could rightly be demanded.

"In the Name of the Law.

"*Warrant of Arrest.*

"The Juge d'Instruction of the Civil Tribunal at Bayeux, has issued the Warrant which follows:

"We Duc Michel Arthur, Juge d'Instruction of the district of Bayeux, require and order the apprehension and conveyance to the House of Arrest, of one David Henri Bellencontre . . . . Notary . . . . Accused of having at Tour, Calvados . . . .

'(3.) Since 7th October, 1889, and 13th June, 1890, embezzled or misappropriated, to the injury of one M. Malassis, certain sums of money which had been delivered to him in his capacity of Notary.

"(4.) Since January, 1890, embezzled or misappropriated to

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the injury of one M. Lefortier, a certain sum of money which had been delivered to him in his capacity of Notary . . . .

"(17.) Since 25th June, 1890, embezzled or misappropriated to the injury of Madame Verdelet Lamare a certain sum of money which had been delivered to him in his capacity of Notary.

"(18.) Since 25th June, 1890, embezzled or misappropriated to the injury of Madame Brunet née Guilbert, a certain sum of money which had been delivered to him in his capacity of Notary . . ."

Crimes provided for and punished by Article 408 of the Penal Code, which is thus conceived:

"Whoever shall have embezzled or misappropriated to the injury of the owners, possessors, or holders any effects, moneys, goods, bills, receipts, or other writings containing or operating in obligation or discharge, which shall have been delivered to him only by right of hire of deposit, under writ, security, loan at interest, or for a work salaried or not salaried, upon the condition to return them or to employ them for a specific purpose, will be punished with the penalty prescribed in art. 406.

"If the fraud provided against and punished by the preceding paragraph has been committed by an officer, public or ministerial, or by a servant, or man employed in service at wages, pupil, clerk, traveller, workman, companion, or apprentice, to the injury of his master, the penalty will be that of reclusion. . . .

"We require and order all officers to whom the present warrant may be exhibited to lend main force if necessary towards its execution.

"And the Keeper of the House of Arrest at Bayeux to receive the prisoner conformably to law.

"In witness, &c. Done at Bayeux, December 11, 1890.

"(Signed) A. DUC."

By the extradition treaty with France, art. 3, clause 18, one of the crimes for which extradition is to be granted is defined thus: "Abus de confiance, ou détournement par un banquier, commissionnaire, administrateur, tuteur, curateur, liquidateur, syndic, officier ministériel, directeur, membre ou employé d'une société, ou par toute autre personne." (1)

(1) See *London Gazette*, May 21, 1878, p. 3163.

By 24 & 25 Vict. c. 96:—

"Sect. 75. Whosoever, having been

The following is the requisition signed by the Home Secretary:—

"To the Chief Magistrate of the Metropolitan Police Courts, or other magistrate of the Metropolitan Police Court at Bow Street.

"Whereas in pursuance of the Extradition Acts of 1870 and

intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively, and whosoever having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than five years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a

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1873 a requisition has been made to me the Right Honourable Henry Matthews, one of Her Majesty's Principal Secretaries of State, by M. Waddington, the Diplomatic Representative of the French Republic, for the surrender of David Henri Bellencontre accused of the commission of the crime of fraud by a bailee within the jurisdiction of the French Republic.

"Now I hereby by this my order under my hand and seal signify to you that such requisition has been made, and require you to proceed in conformity with the provisions of the said Acts.

"Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, the 22nd of December, 1890.

[Seal, Home Office.]

"(Signed) HENRY MATTHEWS."

The following is a copy of the warrant of arrest signed by Sir John Bridge:—

"*Police Court, Bow Street.*

"*Metropolitan Police District to wit.* } To all and every the constables of the Metropolitan Police Force, and to the Keeper of Her Majesty's Prison at Holloway, in the County of London, and within the Metropolitan Police District.

"Be it remembered that on this 22nd January, A.D. 1891, David Henri Bellencontre (hereinafter called the defendant) is brought before me the Chief Magistrate of the Metropolitan Police Courts, sitting at the Police Court in Bow Street, within the Metropolitan Police District to shew cause why he should

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greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

"76. Whoever being a banker, merchant, broker, attorney, or agent, and being intrusted either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the direction of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned."

not be surrendered in pursuance of the Extradition Act on the ground of his being accused of the commission of the crimes of fraud by a bailee and frauds as an agent within the jurisdiction of the French Republic, and for as much as no sufficient cause has been shewn to me why he should not be surrendered in pursuance of the said Act.

"This is therefore to command you the said constable in Her Majesty's name forthwith to convey and deliver the body of the said defendant into the custody of the said Keeper of Her Majesty's Prison at Holloway, and you the said keeper to receive the said defendant into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant."

The evidence on the 3rd charge in the French warrant was as follows:—

Jacques Cyrus Malassis deposed: "I had confidence in M. Bellencontre, and I left with him on deposit on the 7th October, 1889, a sum of 6000 fr. In the course of the year 1890, M. Bellencontre told me that one M. Hue, farmer at Aiquerville, had begged him to find a sum of 15,000 fr.

"He asked me if I could furnish him with a like sum to make an investment. I told him that I would endeavour to contrive to raise the necessary funds.

"On 6th June, 1890, I paid into the hands of M. Bellencontre a sum of 5000 fr. at Trevières at the Hotel Leneven. The notary delivered to me the receipt which you have in your hands. On the 13th June following I went again to Trevières, and paid into the hands of M. Bellencontre at the Hotel Leneven, a sum of 3000 fr. for which he gave me a receipt. In order to complete the sum of 15,000 fr. M. Bellencontre was to take 1000 fr. on the interest which he had to receive from several of my debtors in his office. No deed of bond has been signed by me, and in spite of my reiterated demands, M. Bellencontre has never told me the use which he has made of my 15,000 fr.

"I have learnt since that M. Bellencontre has fled, and that M. Hue was not my debtor. I fear indeed that the notary has not got my 15,000 fr."

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The receipts signed by Bellencontre were as follows:—

"M. Malassis pays me this day 3000 fr. for Hue investment. I will advance 1000 fr. to be received from his debtors, and with 6000 fr. deposited the 7th October last, he will have an investment of 15,000 fr.

"Trevières, June 13, 1890."

"Received of M. Malassis the sum of 5000 fr. to be invested with M. Hue.

"Trevières, June 6, 1890."

On June 8, 1890, Bellencontre wrote to Malassis as follows:—

"Sir,—In reply to your letter received this morning, please call on me at Trevières on Friday, and bring me your disposable funds, and we shall easily come to an understanding as to the surplus."

Evidence on the 4th Charge.

Gustave Bassourdy, living at 35, Rue Hallé, Paris, deposed: "I had in the month of April last given power to M. Bellencontre, notary at Tour, to contract a loan amounting to the sum of 1000 fr. for me. Bellencontre remitted this power to M. Bourdon, formerly notary at Caen Place, St. Martin.

"The latter received the money from a lady client whose name I do not know. This sum has been paid me by successive fractions. This affair has been entirely liquidated. I have always on this subject manifested to M. Bellencontre my discontent as to the fees which he has believed he should retain as to the entire sum, fees amounting to an exorbitant sum. I have not contracted any loan. I do not know M. Lefortier, at Etreham, and I do not know if the latter has deposited the money in the office of M. Bellencontre.

"I am not his debtor for whatever this may be.

"If, as seems to result from the communications you make to me, a deed has been passed by M. Bellencontre, agreeing to a loan to me from M. Lefortier, it is simply a forgery."

Pierre François Lefortier, residing at Etreham, deposed:—

"In the month of January, 1890, M. Bellencontre asked me if I could dispose of a sum of 2500 fr., for which he had an investment.

"I answered him affirmatively, and paid him the funds. On February 3, 1890, a deed of bond was drawn by which one M. Elie acknowledged himself our debtor in 2500 fr. This loan was agreed for five years. The repayment was to take place on January 12, 1895.

"In the course of the month of July, 1890, I reclaimed my title from Bellencontre. He replied that Elie had repaid, and that he would find me another borrower, I returned many times afterwards to Bellencontre to know if my money was invested. Things went on thus up to the end of the month of August, at which time Bellencontre told me that he had indeed found a borrower, but that, information shewing that this borrower did not offer sufficient security, it was in our interest that he was seeking another.

"At length on September 2, 1890, I went to M. Bellencontre and demanded of him either my title or my money.

"He answered me as previously that my title was not returned from the Registry, and delivered to me a receipt for 2500 fr., adding that one borrower was a M. Bassourdy, living at Paris.

"Since that period we have heard nothing more said about it. Bellencontre has fled.

"I know not if he has remitted the funds to Bassourdy. We have not a title (deed), and I have not signed any.

"Happily for me, I made him give me a receipt for 2500 fr. on September 2 last.

"Bellencontre paid us the interest on this sum of 2500 fr. in the middle of September last.

"He owes me only the interest pro ratâ since that time."

Desiré Charles Victor Halley, formerly clerk to Bellencontre, deposed:—

"About two months ago Pierre François Lefortier, property holder, living at Etreham, came to the office of M. Bellencontre to reclaim the deeds concerning an investment made by him in the office. This investment was of 2500 fr.

"The borrower was one M. Bassourdy, living at Paris, 35 Rue Hallé. This investment I believe has not been made. I am certain that the 2500 fr. were paid into the hands of M. Bellencontre,

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for I heard M. Bellencontre several times tell M. Lefortier that he would give him his deeds.

"Bassourdy came to Tour, to the office of M. Bellencontre, about three weeks ago. He was accompanied by a M. Albert Piquerel, property holder at Crounay, purchaser of the estates of M. Bassourdy. At this time M. Bellencontre had already gone, and we had not seen him for three days."

Evidence on Charge 17.

Arthur Jules Guilbert, farmer, living at Mosles, deposed:—

"At the death of my mother all the estates which she possessed were sold. M. Dupard, innkeeper at Port-en-Bessin, bought on June 3, 1888, divers estates situated at Crounay, for the price of 23,400 fr. The succession of my parents was represented by Mesdames Verdelet Lamare and Brunet and by me. I was to receive for my share 11,700 fr., the half. On October 1, 1888, M. Dupard made a first payment in the office of Bellencontre. The ladies, Verdelet Lamare and Brunet, and I, were present at the payment made by M. Dupard, who gave me 7700 fr. and kept a capital sum of 4000 fr. for the purpose of a "Rente" of 200 fr. to the Carel couple, hatters at Bayeux. This Rente had been imposed on it as a charge. M. Carel is dead, and when Madame Carel shall be deceased M. Dupard will pay me this capital sum of 4000 fr., and will be completely unencumbered for me.

"A notarial receipt was made on June 3, 1888, by M. Bellencontre, who signed it as well as I. I have received the 7700 fr. paid by M. Dupard, so that Bellencontre has not kept anything in his hands.

"On June 25, 1890, M. Dupard paid the balance of his price, viz., 11,700 fr. to M. Bellencontre. I was present at the payment as well as Mesdames Verdelet Lamare and Brunet. M. Dupard paid further 585 fr. for interest, which brought up his payment to 12,285 fr.

"In consequence of an arrangement made between my sister and me on the subject of a piece of land which had been sold me by my brother for 2000 fr., and which, in error, had been included in the properties bought by M. Dupard, I received of

the sum paid on June 25, 1890, by M. Dupard a sum of 1000 fr., my sisters having no right to this sum. It resulted that my sisters received only 10,700 fr., plus interest.

"A notarial receipt was drawn up the same day by Bellencontre, who signed it as well as my sisters and I. M. Dupard was then discharged as regards us.

"The 10,700 fr. accruing to my sisters half for each, was to be re-invested on account of their position as 'dotal' wives. M. Bellencontre kept the funds in order to make the re-investment. I know not if the re-investment was made."

Madeline Anne Guilbert, wife of Jean Baptiste Verdelet Lamare, deposed:—

"On the death of my mother we were to sell all the properties which she left, in order to proceed to share the succession. On June 3, 1888, M. Dupard, innkeeper at Port-en-Bessin, bought divers estates situated at Crounay for the price of 23,400 fr. The succession was represented by Madame Brunet my sister, Arthur Guilbert my brother, and me.

"Arthur Guilbert was to receive 11,700 fr., my sister and I 11,700.

"On October 1, 1888, M. Dupard made a first payment in the office of Bellencontre, my sister, my brother and I being present. Arthur Guilbert my brother received 7700 fr., for which he gave receipt. M. Dupard kept a sum of 4000 fr. in order to provide an annuity of 200 fr. to the Carel couple, hatters at Bayeaux, in execution of a clause in the list of charges.

"On June 23, 1890, M. Dupard paid in my presence, and that of my brother and sister, a sum of 11,700 fr. balance of his purchase price into the hands of M. Bellencontre. He paid besides a sum of 585 fr. for interest due, for which my sister and I gave receipt.

"In consequence of an error committed in the sale, my sister and I were obliged to restore 1000 fr. to our brother Arthur Guilbert, who received the 1000 fr., and gave a receipt for it to M. Dupard.

"The 10,700 fr. capital which remained belonged to us, my sister and me, one half each. As this capital was to be

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employed again on account of our position as 'dotal' wives, the money was deposited with M. Bellencontre.

"We were present when the money was deposited in his hands, who drew up a receipt which my sister and I signed. Bellencontre told us when receiving the money, that he would reply (1) as to the investment.

"We have indeed found a re-investment for those moneys in the office of M. Lebire, but M. Bellecontre, who was to pay the funds on the morrow of Christmas day, 1890, has taken flight eight hours after I had given him notice of the re-investment."

Victor Honoré Dupard, innkeeper, living at Port-en-Bessin, deposed:—

"On June 3, 1888, I purchased before M. Bellencontre, notary at Tour, divers estates situated at Crounay, proceeding from the Guilbert succession, represented by Mesdames Verdelet Lamare and Brunet, and by M. Arthur Guilbert.

"On October 1, 1888, I paid at Tour in the office of M. Bellencontre, notary, a sum of 7700 fr. in the presence of M. Arthur Guilbert and of Mesdames Verdelet Lamare and Brunet. A receipt was delivered to me by M. Bellencontre, notary, and the 7700 fr. which I came to pay was given to M. Arthur Guilbert. I kept a sum of 4000 fr. to provide for an annuity of 200 fr. to the Carel couple, hatters at Bayeaux. The husband died about two years ago. I kept this sum of 4000 fr. to provide for an annuity of 200 fr. to the said Carel couple, as that had been imposed by the list of charges.

"As my price of purchase was 23,400 fr., I was then discharged from half my debt. This half appertained to the share of Arthur Guilbert. A notarial deed had been drawn up by M. Bellencontre, and the receipt was signed by M. Bellencontre and M. Guilbert.

On June 25, 1890, I paid to Bellencontre the 11,700 fr. balance of my purchase money, plus 585 fr. interest. The 12,285 fr. was the share going to Mesdames Verdelet Lamare

(1) So translated in the English translation of the original French depositions used in Court. The true meaning, however, appears to be that he was confident he should be able to find an investment, as explained by Wills, J., post, p. 144.

and Brunet. All my creditors were present. A notarial receipt was made out by Bellencontre, and signed by him and my creditors. I am, therefore, completely discharged in respect of every one."

Evidence on Charge 18.

Aline Marie Guilbert, wife of Jean Baptiste Brunet, deposed:—

"When my mother died we had to sell all her property in order to be able to share the succession. On June 3, 1888, M. Dupard, innkeeper at Port-en-Bessin, became purchaser of several estates situated at Crounay. His price of purchase was 23,400 fr.

"The heirs were my sister, Madame Verdelet Lamare, our brother Arthur Guilbert, and I. Arthur Guilbert, who had bought the share of our brother Francis, was to receive 11,700 fr. There came therefore to my sister and me an equal sum of 11,700 fr.

"On October 1, 1888, M. Dupard made a first payment in the office of Bellencontre. I attended there as well as my sister and my brother Arthur. Dupard paid 7700 fr., which my brother Arthur received, for which he gave a receipt. Dupard retained a sum of 4000 fr., conformably to a claim on the schedule of charges to provide for an annuity of 200 fr. to the Carel couple, hatters at Bayeux.

"On June 25, 1890, M. Dupard made a second payment in my presence, and that of my sister and of our brother Arthur. Dupard paid 11,700 fr. capital balance of the purchase money, and 585 fr. for interest due. We received the 585 fr. interest, and gave a receipt to M. Dupard. In consequence of an error committed in the adjudication, we paid to our brother Arthur a sum of 1000 fr., and he also gave a receipt for that to Dupard.

"The 10,700 fr. capital remained to be divided between my sister and me in halves. It was paid by Dupard to Bellencontre, who retained it because it was to be reinvested on account of our position as 'dotal' wives. We were all present when the capital was paid into the hands of Bellencontre. The notary drew up a receipt, and made my sister and me sign it. On

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receiving the money, Bellencontre told me that he would answer (1) as to the reinvestment. The reinvestment of my capital was to be made in a first mortgage. I have not yet found a mode of reinvestment, but I do not know what has become of my capital, Bellencontre having taken flight. I have not seen Bellencontre again since the day when the funds were paid by Dupard."

Evidence on Charges 17 *and* 18.

Antoine Edmond René Lefèvre, notary, living at Bayeux, deposed:—

"On September 26 last (1890), accompanied by M. Herbert, notary at Isigny, on the summons of the president of our chamber, we repaired to the office of Bellecontre, notary at Tour, to verify certain facts that had been notified to us in our capacity of delegates.

"We required him to exhibit to us his cash book, which we balanced, and we affixed thereto our visa. We ascertained a deficit of 7271 fr. 53 cent. under the heading, funds of clients.

"We also demanded of Bellencontre to exhibit to us a sum of 10,700 fr. which he had received about the month of June last on account of Mesdames Verdelet Lamare and Brunet, nées Guilbert, and destined for a dotal reinvestment. This he has not been able to do, nor to justify that a reinvestment was made.

"We repaired on November 4 and 5 to the office of the said notary, and in view of his absence have not been able to proceed to any verification."

Feb. 23, 24. *Sir Edward Clarke, Q.C., S.-G.*, and *Henry Sutton*, (*Sir Richard Webster, Q.C., A.-G.*, with them), shewed cause. The objection that the French warrant does not specify offences for which extradition can be granted is disposed of by article 408 of the French Penal Code, and by the cases of *Reg.* v. *Jacobi* (2) and *Ex parte Piot.* (3) The English warrant is good. It substantially agrees with the French warrant, and specifies crimes

(1) See note (1), ante, p. 132. (2) 46 L. T. (N.S.) 595, n.
(3) 48 L. T. (N.S.) 120.

according to both French and English law. It is not required, and it would be impossible, that the English warrant should be a literal translation of the French warrant. *Ex parte Terraz* (1); *Reg.* v. *Ganz* (2); *Reg.* v. *Weil.* (3) There is sufficient evidence to justify the committal and extradition of the prisoner on several of the offences specified in the French warrant. The evidence brings the case within Article 3, clause 18, of the Treaty, within Article 408 of the French Penal Code, and within 24 & 25 Vict. c. 96, s. 75 or s. 76, or perhaps within both those sections: *Reg.* v. *Tatlock* (4); *Reg.* v. *Fullagar.* (5) [They also referred to *Reg.* v. *Maurer* (6); *In re Castioni.* (7)]

[WILLS, J., referred to *Ex parte Lamirande.* (8)]

J. P. Grain and *Eldridge* in support of the rule. The warrants are insufficient, and the evidence does not shew any offence which comes within the Treaty of Extradition: *Reg.* v. *Cooper* (9); *Reg.* v. *Newman* (10); *In re Windsor.* (11)

There is no evidence to bring the case within either s. 75 or s. 76 of 24 & 25 Vict. c. 96, nor is anything shewn in the nature of larceny by a bailee or larceny by a trick, and it cannot be said that there has been embezzlement, for the prisoner was not in the position of a clerk or servant. Some of the charges specified in the French warrant must fail, and, as the committal appears to be on all, the failure of one will vitiate the whole warrant. [They also referred to *Reg.* v. *Hassall* (12); *Reg.* v. *Oxenham.* (13)]

Cur. adv. vult.

Feb. 26. The following judgments were delivered:—

CAVE, J. In this case the Solicitor-General and Mr. Sutton shewed cause against a rule nisi for a habeas corpus which had been obtained on behalf of David Henri Bellencontre on the

(1) 4 Ex. D. 63.
(2) 9 Q. B. D. 93.
(3) 9 Q. B. D. 701.
(4) 2 Q. B. D. 157.
(5) 41 L. T. (N.S.) 448.
(6) 10 Q. B. D. 513.
(7) [1891] 1 Q. B. 149.
(8) 10 Lower Canada Jurist., 280; Clarke on Extradition, 3rd ed. p. 113, and Appendix cclii.
(9) Law Rep 2 C. C. 123.
(10) 8 Q. B. D. 706.
(11) 6 B. & S. 522.
(12) L. & C. 58; 30 L. J. (M.C.) 175.
(13) 46 L. J. (M C.) 125.

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ground that he had not committed any extradition crime for which he could be delivered over for trial to the authorities in France. Substantially two points were made on his behalf; the one technical, the other substantial. The first or technical point had reference to the form of the French warrant, the warrant of the Secretary of State, and the warrant of Sir John Bridge; and it was contended that they or some of them were not in the proper form. I am of opinion that there is nothing in that ground of objection. When one comes to look at the French warrant it appears to me to state an offence within No. 18 of the crimes for which extradition is to be granted. It states in effect that the prisoner was in nineteen cases guilty of an abuse of confidence and of fraudulent misappropriation of the property which had been deposited with him in his character of a notary. That seems to me a sufficient statement of an offence under No. 18 of the Extradition Treaty. The warrant of the Secretary of State only translates that into the corresponding English provision of the same article, and describes the charge as one of fraud by a bailee. That no doubt is somewhat wider than the statement in the French warrant, which specifies fraudulent misappropriation by a notary who has been intrusted with the property, but I see no objection to it on the ground of its being wider. The duty of the Secretary of State is to call the attention of the police magistrate to what he is required to do under the Extradition Treaty, and it is enough if he draws attention to the particular crime under the 3rd article of the Extradition Treaty, and that is fraud by a bailee, which expresses in general terms what is expressed rather more specifically in the French warrant. The warrant of Sir John Bridge seems to me also perfectly good. "Fraud by a bailee" is a term used in No. 18, and it is for the magistrate to inquire whether the evidence laid before him shews an offence of "fraud by a bailee" of such a nature as would be cognisable in an English court of justice. Now, in order to do that, he has to consider the law in respect of frauds by bailees and the evidence which is produced before him, and he arrives at the conclusion that there is evidence of a fraud by a bailee who is an agent of the party. Although it might not be sufficient to convict any bailee in an English

court of justice, it is sufficient for the purpose when the bailee who is charged is an agent. It seems to me that is a very proper mode of expressing the result of the inquiry, and that there is no ground for saying that there is any technical informality in any of these warrants which would justify us in discharging the prisoner.

Then we come to the substantial point, which is that the evidence which was laid before Sir John Bridge was not sufficient to have satisfied him that a crime punishable by English law had been committed by Bellencontre. Now, when one comes to deal with that point, one is at once struck with the superiority of the French criminal law over our own. We find there a perfectly clear and comprehensive definition of the offence which is made punishable. It is abuse of confidence or fraudulent misappropriation by any person who has been intrusted with property, a wide and general definition which embraces undoubtedly a good deal more than is expressed by our law on the same subject. Our law, unfortunately, instead of being in the form of a code, or even of a well-drawn Consolidation Act, is a thing of shreds and patches, and one has to look to different portions of the statute law in order to see to what extent a person who has been intrusted with property is made responsible for the fraudulent misappropriation of it.

Now, we find that law, as I have said, in different parts of our statute law. In the case of a bailee—in the case, that is to say, of all bailees—they are made responsible where the article which they have been intrusted with is one which they are to return or to deliver to somebody else in specie, but they are not made responsible where they are at liberty, or are bound, to convert the particular article delivered to them into something else before they return it or deliver it to the other persons to whom they are instructed to deliver it. Now that being the case, the charge against Bellencontre did not prove an offence of that nature. Therefore that particular provision of our law is out of the question.

Then there are two sections in the Act of 1861, which deals with crimes against property (24 & 25 Vict. c. 96), namely, ss. 75 and 76, which also contain provisions for the punishment of

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fraudulent bailees in certain cases and of fraudulent bailees of particular kinds. Where a man is a bailee of a particular kind—a banker, a merchant, an agent or a factor—and receives property with written instructions how he is to dispose of it, and he misappropriates that property, then under s. 75 he is punishable; but our law requires, what the French law does not require, written instructions, and therefore the first part of that section is not applicable to the present case. There is the second part of the section which is also not applicable, because it excludes money which was the subject-matter of the offences committed by Bellencontre in this case. That brings us to s. 76, which is the last provision of the statute law having any application to a case of that kind, and by that section bailees of a certain specified description, bankers, agents and other people are made punishable when they receive property for safe custody and misapply it. That, again, is obviously very much narrower than the French offence, because, in the first place, it applies, not to all bailees, but only to bailees of the kind there specified, and whether the specification is sufficiently wide to include all bailees I should prefer not to say, because it is impossible to know what circumstances may subsequently arise which may turn out, although they are cases of bailees, not to be included in the specified kinds of bailees here referred to. Not only in that respect may there be a difference, but there obviously is another very important difference between the French law and the English law in this respect, that by our law the property must have been intrusted to the particular bailee for safe custody. If it is intrusted to him for any purpose other than that special purpose, then the selling or parting with the goods or transferring the property is no longer an offence within s. 76. Therefore, as I have said, it follows that our criminal law is very much narrower on those points, and far less clear, than the law of France is. It is fenced round with exceptions, which make it somewhat difficult at times to apply it. We have, therefore, to see whether the facts laid before the magistrate justified him in coming to the conclusion that there was a primâ facie case made out of an offence against the English law. Now, for that reason I have gone, with the assistance of my learned brother, carefully through the nineteen different cases which have

been made against Bellencontre, and I find that with regard to the third, the fourth, the seventeenth and eighteenth cases, there is primâ facie evidence of the commission of a crime against the English law, or what would be a crime by English law. Of course, it does not follow that because there is primâ facie evidence to that effect the prisoner will necessarily be convicted of it. That will be a question for the tribunal by which he will have to be tried; but all that is necessary for the magistrate here to be satisfied of is that there is such evidence as would warrant him in committing the prisoner for trial in an English Court of justice, if what he did had been done in this country. It appears to me, having regard to those four cases, that there is the necessary amount of evidence, and, consequently, as to those four, he would be rightly extradited for the purpose of being tried in France. That being so, it follows to my mind that the warrant is good, and that, consequently, the writ of habeas corpus ought not to go. Two objections have been raised by Mr. Grain, about which I should like to say a word, and one is that the term made use of in the French warrant is embezzlement. Now, in the first place, that is not the term used in the French warrant: that is the term made use of to translate it. It might with equal propriety be translated as fraudulent misappropriation, and then the point made by Mr. Grain would not arise. That point was that embezzlement in our law means misappropriation of money by a clerk or servant. Embezzlement does not mean that misappropriation by a clerk or servant is the only species of embezzlement to which the law actually gives that name, and so it is to be regarded as if that were the only subject-matter to which the term embezzlement could be applied; but in my judgment that is not so: embezzlement means nothing more nor less than a fraudulent misappropriation, and although it is called embezzlement where it is committed by a clerk or servant, because it is only in that case that it is made punishable under that name, yet the thing actually exists in other cases than those of a clerk and servant, and is made punishable in the case of a banker, merchant, factor, or agent by those sections of the Act of 1861, to which I have referred. Another point which was taken was that, inasmuch as Sir John Bridge has committed the

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prisoner upon all of these charges, therefore, the warrant not being good as to all of them, it is bad as to all. That is a point which I am unable to understand. There is a committal of the prisoner upon a warrant which describes him as having been guilty of frauds as a bailee and of frauds as an agent. It does not specify upon which of those offences the evidence had satisfied Sir John Bridge. I think it is fair to assume in the absence of anything to the contrary, that it may have satisfied him upon all. If it did satisfy him upon all, then to that extent it seems to me that he was wrong, that there was no evidence that should have satisfied him except in the four cases that I have named. But the only object of specifying those cases is in order to give the prisoner the right, if he wishes to make use of it, to object to being tried in France for those other offences—for the other fifteen—on the ground that those are not in themselves crimes for which he could have been extradited. That objection he will have the opportunity of taking; but I do not see that there is any reason why the warrant, which is in perfectly general terms, is not to be held by us to be good in respect of those cases as to which there is sufficient primâ facie evidence to go upon. For that reason it seems to me that this technical objection, like the others, fails, and that consequently the rule ought to be discharged.

WILLS, J. I am of the same opinion. As to the technical objections which have been referred to, there seems to be really nothing in them, and I do not think they are worth serious discussion. The substance of the Extradition Act, 33 & 34 Vict. c. 52, seems to me to require that the person whose extradition is sought should have been accused in a foreign country of something which is a crime by English law, and that there should be a primâ facie case made out that he is guilty of a crime under the foreign law, and also of a crime under English law. If those conditions are satisfied, the extradition ought to be granted. We cannot expect that the definitions or descriptions of the crime when translated into the language of the two countries respectively, should exactly correspond. The definitions may have grown up under widely different circumstances

in the two countries; and if an exact correspondence were required in mere matter of definition, probably there would be great difficulty in laying down what crimes could be made the subjects of extradition. Now this difficulty has been met, as it seems to me, by the first schedule to the Extradition Act, 1870 (33 & 34 Vict. c. 52), which describes what are the various extradition crimes. In this case, the man has been accused of a number of things which clearly fall within article 408 of the French Code, and therefore are crimes in France, and crimes which clearly fall under number 18 in the French part of the Treaty of Extradition. One looks, then, to see whether in the corresponding English section, No. 18 of article 3, there is a crime described by English law which crime has been made out by the evidence. It seems to me that there is no difficulty in saying which of the definitions it falls under. It is either fraud by a bailee or an agent, made criminal by an Act in force in England. I cannot help saying that I share a certain feeling of humiliation which my learned brother has expressed, when one is obliged to confess formally to a neighbouring country that a great part of the atrocious things which have been done by this man, if the evidence is to be relied upon, are not punishable by English law. It does seem an extraordinary thing that a man being intrusted with money by other people for investment should be able to put it into his own pocket fraudulently and dishonestly, and yet commit no crime punishable by English law. I am reminded of a circumstance that was mentioned to me some time ago by a friend very greatly versed in the English criminal law. In the course of his studies he made out a list of the iniquitous things which could be done by the English law, without bringing the man under any provision of the common or statute law, and he had had it in his mind at one time to publish it, to shew how defective the law was, but he forbore on grounds of public policy to call attention to what people might do without rendering themselves liable to punishment. Certainly we have a very signal illustration of it with regard to the particular classes of fraud established in this case. But fortunately we have s. 76 of the Act, 24 & 25 Vict. c. 96, which provides that whoever being, amongst other

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things, an attorney or agent, and intrusted with the property of any other person for safe custody, shall commit certain frauds in respect of it shall be punishable. There is no doubt that Bellencontre answered this description of an attorney or agent as nearly as a person carrying on business in France could. There is no doubt also that he was intrusted with property within the meaning of that section, because he was intrusted with money, and the definition clause (24 & 25 Vict. c. 96, s. 1) makes money a portion of the articles which are comprehended under property. There is no doubt also that there is evidence that with intent to defraud he appropriated that money to his own use.

Then one question remains, was he intrusted with the money for safe custody? This section deals with property of every description, and money is probably the most important and the most common subject in respect of which frauds of this kind are carried out, so I cannot for a moment doubt that the section was meant to have a real and substantial operation with regard to money, and with regard to money that was intrusted to, amongst other people, merchants, brokers, attornies, or agents. Now, to hold, as has been suggested, that the section applies only to money which is put into a bag and given to a man to keep in a drawer would be, to my mind, simply a reductio ad absurdum, because in the business of this and every other civilised country no such process as that ever takes place; and the probability is that if a man did keep money intrusted to him for safe custody in that way it would be said, if he lost the money, that he had not taken reasonable means to secure its custody. I cannot doubt that it is fully within the meaning of the Act, if the money is intrusted to him under circumstances which would make it his duty to pay it to a special account with a bank, or to keep it in any other reasonable way in which men of business ordinarily keep their money, so as to have, not the specific coins, but the equivalents, at call when demanded. It seems to me that *Reg.* v. *Fullagar* (1) is absolutely on all-fours with some portion of the present case in that respect, because there the money which was held to be the subject of safe custody in the hands of the solicitor who received it, was paid over to him on

(1) 41 L. T. (N.S.) 448.

behalf of a client to whom he wrote announcing that he had it, and asking for instructions for investment. He received answers which clearly contemplated future investment, but which also contemplated that the client could interfere further by giving directions as to investment on being consulted before the investment was actually made. Under those circumstances the Court held, without any hesitation, that it had been intrusted to him for safe custody. In the present instance, in numbers 3 and 4, which my learned brother has dealt with, my opinion, and I believe his, is that with regard to the sums of 6000 fr. and 2500 fr. respectively, there is evidence (we do not say conclusive evidence, but there is evidence) that the 6000 fr. was originally, and the 2500 fr. after repayment by Elie, intrusted, not for investment, but for safe custody, and that there had been no change of the circumstances under which either sum was so held; therefore, they seem to us to fall within the principle of *Reg.* v. *Fullagar.* (1) With regard to the other two charges (numbers 17 and 18), the case of the Guilberts, the two sisters for whom this man had received a sum of money of about 11,000 fr., which belonged in moieties to each of them, but as to which, inasmuch as the moneys were subject to dotal rights, so that there might be persons in succession to them who would be entitled to the capital, they could not themselves receive the capital and divide it, there is, I do not say conclusive evidence, but there is evidence that he held that sum for investment in this sense, and in this qualified sense only, that he, like themselves, was to look out for an investment, and, if he found an investment, to communicate with them and ascertain whether it was satisfactory, they in the meantime looking out for investments themselves. The fact that one of them found an investment, and the other had been looking out for it, seems to my mind to be evidence that there was no definite trust to the agent to invest without further consultation with them, and that, therefore, until any further directions should be given, which would be necessary before investment took place, it was held for safe custody and nothing else. A good deal of stress was laid upon an expression in which it was said that he had made himself answerable for the investment. I

(1) 41 L. T. (N.S.) 448.

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have already pointed out that I do not think that is at all the meaning of the French term, and that "J'en réponds," in my opinion means, "I will answer for it," in this sense, that "I am perfectly confident I shall be able to find an investment," not that "I make myself responsible to invest it without anything further." It seems to me, with regard to those four offences, that there is distinct evidence to go to a jury, and, therefore, evidence sufficient to justify the committal by the magistrate for extradition. I think, also, that the objection that because some of the charges are not within the Extradition Treaty, therefore the warrant is bad, and the man is to be set at liberty, cannot be maintained. It seems to me that the warrant is general. It speaks of committal for crimes of a certain specified kind, which are described in number 18 of article 3 of the Treaty, and it is sufficient, if there are facts which are evidence that such crimes have been committed. The warrant is statutory in its form, and is not to be construed as an ordinary English common law document, and it is not at all necessary, in my judgment, that there should be anything like the same particularity that there would be in respect of the warrant of committal to the gaols of this country under ordinary circumstances. For these reasons, I am of opinion that this habeas corpus ought not to issue.

Rule discharged.

Solicitor for the prosecution: *The Solicitor to the Treasury.*
Solicitor for the prisoner: *S. Myers.*

P. B. H.

[CROWN CASE RESERVED.]

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April 25.

THE QUEEN *v.* GRIFFITHS.

Criminal Law — Bankrupt — Misdemeanor — Presentation of Petition by Bankrupt himself—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-ss.* 13, 14, 15—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 26.

By s. 11, sub-ss. 13, 14, and 15 of the Debtors Act, 1869, certain acts are constituted misdemeanors if committed by a debtor "within four months next before the presentation of a bankruptcy petition against him." By s. 26 of the Bankruptcy Act, 1890 (which came into operation on January 1, 1891), "s. 11 of the Debtors Act, 1869, shall have effect as if there were substituted therein for the words 'if within four months next before the presentation of a bankruptcy petition against him,' the words 'if within four months next before the presentation of a bankruptcy petition by or against him'":—

Held, that the effect of s. 26 of the Bankruptcy Act, 1890, was not retrospective, so as to render liable to conviction for offences under sub-ss. 13, 14, and 15 of s. 11 of the Debtors Act, 1869, a person who committed the acts specified in those sub-sections before January 1, 1891, and presented his own petition after that date.

CASE stated by the Recorder of Worcester.

The defendant was tried at the quarter sessions of the city of Worcester, held on April 6 last, on an indictment, containing several counts, charging him with offences under s. 11, sub-ss. 13, 14, and 15 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 26. (1)

(1) By s. 11 of the Debtors Act, 1869 (32 & 33 Vict. c. 62): "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanour . . . that is to say:

Sub-s. 13: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same;

Sub-s. 14: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud;

Sub-s. 15: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property

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It was proved that the defendant traded in Worcester as a boot and shoe dealer, and that at various times in November, 1890, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and with intent to defraud, he obtained goods on credit, and had not paid for them. It was also proved that on several days, in November and December, 1890, with a like intent he pawned the goods so obtained. On January 1, 1891, the Bankruptcy Act, 1890, came into operation.

On January 14, 1891, the defendant presented a petition that he might be adjudged bankrupt, and on the same day a receiving order was made against him, and he was adjudged bankrupt.

It was contended, on behalf of the defendant, that the acts charged against him were committed before the Bankruptcy Act, 1890, came into operation, and that, as no bankruptcy petition had been presented against him, he could not be convicted of the offences defined in the 11th section of the Debtors Act, 1869.

The jury found the defendant guilty on all the charges. The learned recorder reserved the question of law, and the defendant was admitted to bail to come up for judgment if the conviction should be affirmed.

The question for the opinion of the Court was whether the conviction could be sustained.

Vachell, for the defendant. The conviction was wrong. The Debtors Act, 1869, came into force at the same time as the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and the last-mentioned Act contained no clause enabling a debtor to file his own petition. The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52),

which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud."

By s. 26 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), "Sect. 11 of the Debtors Act, 1869, shall have effect as if there were substituted therein for the words, 'if within four months next before the presentation of a bankruptcy petition against him,' the words, 'if within four months next before the presentation of a bankruptcy petition by or against him,'" &c.

By s. 30, "this Act shall come into operation on the 1st day of January, 1891."

enabled a debtor to file his own petition, and by s. 163 provided that s. 11 of the Debtors Act, 1869, should have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him," the words, "if after the presentation of a bankruptcy petition by or against him." In *In re Burden, Ex parte Wood* (1), the Queen's Bench Division held that s. 163 did not enable a Court exercising jurisdiction in bankruptcy to order the prosecution of a debtor, who had filed his own petition, for any of the misdemeanors created by sub-ss. 13, 14, and 15 of s. 11 of the Debtors Act, 1869. At the time, therefore, when the acts complained of in the present case were committed, the defendant had an immunity from the consequences of those acts in the case of his filing his own petition. The Bankruptcy Act, 1890, has not a retrospective operation, so as to make that an offence which before the Act came into force was none. The words "shall have effect," in s. 26, mean "shall have effect after this Act comes into force." The legislature did not intend to deprive a debtor of the immunity from prosecution which he had up to that time.

R. H. Amphlett, for the Crown. The Bankruptcy Act, 1890, received the royal assent on August 18, 1890, and it begins by reciting that it is expedient to amend the Bankruptcy Act, 1883, and other enactments relating to bankruptcy. There is therefore no hardship on debtors in holding them liable to conviction for acts committed after the Act was passed. They had full notice of the consequences. The offences in the present case were not completed by the defendant until he filed his petition, which was after the Act came into force. There are many instances in which statutes have been given a retrospective operation similar to that which, it is contended, ought to be applied here: *Towler* v. *Chatterton* (2); *Reg.* v. *Leeds and Bradford Railway Co.* (3)

LORD COLERIDGE, C.J. The question raised in this case is no doubt very capable of argument on both sides; but on the whole I think it is safer to hold that s. 26 of the Bankruptcy Act,

(1) 21 Q. B. D. 24. (2) 6 Bing. 258.
(3) 18 Q. B. 343.

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1890, is not retroactive in its operation, and that where a person is accused of an offence created by that Act, as applied to the Debtors Act, 1869, all the ingredients of the offence must have taken place before January 1, 1891, upon which date the Act of 1890 came into operation. I think that the words in s. 26 "shall have effect" must mean "shall have effect from January 1, 1891." It is admitted that but for the alteration in the law effected by the 26th section, the acts committed by this defendant would not have constituted an offence, because they were committed before the presentation of a bankruptcy petition by himself; but it has been argued that the effect of s. 26 is to constitute those acts an offence. The question is, from what point of time does s. 26 take effect? I am of opinion that it takes effect from January 1, 1891. That conclusion is supported by the view that to give a retrospective effect to the statute would be to deprive the defendant of a defence upon which, at the time the acts complained of were committed, he was entitled to rely. It seems to me a very strong thing to hold that a defence which was open to a man at the time he did the acts complained of has been taken away by the retrospective operation of a subsequent statute. No authority in support of such a construction has been cited to us. I think it is safer to hold that all the ingredients of the offence must have taken place before the Bankruptcy Act, 1890, came into operation, and I am therefore of opinion that this conviction cannot be sustained.

DENMAN, J. I am of the same opinion. I think that their proper and full meaning is given to the words "shall have effect" in s. 26 by holding that they mean "shall have effect from and after January 1, 1891." That seems to me the proper construction of such words occurring in a statute which creates a criminal offence. To construe them otherwise would be to violate a strong rule of law that, unless the intention of the legislature is clearly expressed to that effect, criminal offences are not to be created by giving a retroactive operation to Acts of Parliament.

MATHEW, J. I am of the same opinion.

CHARLES, J. I am of the same opinion. I think, on the whole, that all the ingredients of the offence must have been committed after January 1, 1891.

VAUGHAN WILLIAMS, J. I agree. I think that the words of s. 26 ought to be construed as having a prospective effect only. The distinction between this case and the cases cited by counsel for the Crown, is that here no gap is made by holding that the words have a prospective effect only. There is no danger, therefore, in so construing them.

Conviction quashed.

Solicitor for the Crown: *G. W. Bentley, Worcester, for the Solicitor of the Treasury.*

Solicitor for the defendant: *Dreaper, Worcester.*

W. A.

[CROWN CASE RESERVED.]

May 14.

THE QUEEN *v.* MARSDEN.

Criminal Law—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 4 —*Carnal Knowledge.*

To prove the offence of unlawfully and carnally knowing a girl under the age of thirteen years, under s. 4 of the Criminal Law Amendment Act, 1885, it is not necessary to prove emission.

CROWN CASE RESERVED.

This case was stated by Wright., J., for the consideration of the Court, as follows:—

James Marsden was convicted before me at Manchester, on April 28, 1891, upon an indictment containing a single count, for the felony created by the statute 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 4, namely, carnal connection with a girl under thirteen years.

The jury were satisfied of penetration, but I directed them that there was no evidence of emission, and that under the circumstances of the case—interruption—it could not be presumed.

At the trial I reserved the question whether the prisoner could lawfully be convicted of the said felony, emission being negatived. The prisoner was convicted.

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No counsel appeared for the prisoner.

Sir E. Clarke, S.G., and *H. Sutton*, for the prosecution, were not required to argue the case.

The judgment of the Court (Lord Coleridge, C.J., Denman, Mathew, Cave, and Charles, JJ.) was delivered by

LORD COLERIDGE, C.J. We think it clear that this conviction was right, and must be sustained. No doubt, there have been rulings of single judges, and doubts have been entertained by some judges, especially by Charles, J., who is to-day a member of this Court, and, after consideration, concurs in this judgment, upon the question left to us in this case; but we are all clearly of opinion that the offence indicated by the words "carnal knowledge" in the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), is to be considered as fully proved without giving any proof of emission; and that the law remains the same as it has been since the statute 9 Geo. 4, c. 31, namely, where carnal knowledge constitutes a crime, that crime is complete without emission, upon proof of penetration. We are all of that opinion, and think that this conviction must be sustained.

We think it right to say that, in our opinion, Wright, J., was perfectly justified in reserving this case, because he was aware of the doubts entertained on the point by some judges, but we none of us entertain the slightest doubt that the conviction is correct, and must be sustained.

Conviction affirmed.

Solicitor for the prosecution: *Solicitor to the Treasury.*

W. A.

IN RE PARROTT. EX PARTE CULLEN.

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May 5, 29.

Bankruptcy—Proxy of Creditor—Instrument of Proxy—Attestation by Proxy himself—Sufficiency.

A person who is appointed by a creditor under rule 15 of Sched. I. of the Bankruptcy Act, 1883, to act as his proxy, cannot himself be the attesting witness to the instrument of proxy.

BANKRUPTCY APPEAL from county court.

Mrs. Cullen, who claimed to prove as a creditor against the debtor's estate, appointed one Daniel as her special proxy to vote on her behalf for the appointment of a Mr. Ibeson as trustee. The instrument of proxy was attested by Daniel himself, but in other respects was in the prescribed form—form 76 in the appendix to the General Bankruptcy Rules, 1886.

At the first meeting of creditors, objection was taken to the proxy by the petitioning creditor, on the ground that Daniel could not attest his own appointment, but the official receiver overruled the objection. On appeal, the county court judge overruled the decision of the official receiver, and disallowed the proxy. Mrs. Cullen appealed to the Divisional Court.

F. C. Willis, for Mrs. Cullen. The county court judge proceeded upon the authority of *Seal* v. *Claridge* (1), where it was held that the grantee of a bill of sale, although a solicitor, could not be the attesting witness of it under the Bills of Sale Act, 1878; but that case does not conclude the question, for Lord Selborne went upon the ground that the object of the legislature in requiring that the attesting witness should be a solicitor, and as such should explain the nature of the bill to the grantor, would be likely to be defeated if the attesting witness were the grantee, a person who would have the greatest interest in deceiving the grantor, whereas here the proxy has no interest whatever in the matter. A proxy is not in any sense a party to the instrument appointing him.

H. Reed, for the petitioning creditor. It is against the policy of the rules to allow a proxy to attest his own appointment. The

(1) 7 Q. B. D. 516.

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object of requiring attestation is that it shall be provable that the instrument is really signed by the person purporting to sign it. That ought to be proved by some independent third person who has nothing to do with the transaction. It is true that a proxy is not a party in the sense that an assignee is a party to a deed of assignment, but he is the person who takes the powers which the instrument creates.

F. C. Willis, in reply.

Cur. adv. vult.

May 29. The judgment of the Court (Cave, and Charles, JJ.) was delivered by

CAVE, J. The only question we have to decide in this case is whether under the Bankruptcy Act, a proxy can be an attesting witness to the instrument of proxy. By rule 15 of the first schedule to the Act (which by s. 168, sub-s. 2, is to be construed and have effect as part of the Act), "a creditor may vote either in person or by proxy." By rule 16: "Every instrument of proxy shall be in the prescribed form, and shall be issued by the official receiver, or, after the appointment of a trustee, by the trustee, and every insertion therein shall be in the handwriting of the person giving the proxy." By rule 245 of the Bankruptcy Rules of 1886, a general proxy is to be in the form No. 75, and a special proxy in the form No. 76. By rule 247: "The proxy of a creditor blind or incapable of writing, may be accepted if such creditor has attached his signature or mark thereto in the presence of a witness, who shall add to his signature his description and residence, and provided that all insertions in the proxy are in the handwriting of the witness, and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request of the creditor, and in his presence, before he attached his signature or mark." Form No. 75 contains, after the words of the instrument of proxy, the words "signature of witness," and below that the word "address." It also contains a form of certificate to be signed by the witness of a creditor blind or incapable of filling up the proxy. Form No. 76 is similar. Now, it was not disputed that an attesting

witness was required to an instrument of proxy, and, as has been said, the only question we have to decide is whether the proxy himself can be such witness. The only authority on the subject that was cited to us is *Seal* v. *Claridge* (1), in which it was held by the Court of Appeal that the grantee of a bill of sale under the Bills of Sale Act, 1878, s. 10, sub-s. 1, although he was a solicitor, could not be the attesting witness thereof. That section required that the execution of every bill of sale should be attested by a solicitor of the Supreme Court, and that the attestation should state that, before the execution of the bill of sale, the effect thereof had been explained to the grantor by the attesting solicitor; and the ground of the decision was that an attestation by the grantee was not sufficient, as he was a party to the transaction, and consequently had the greatest possible interest in deceiving the grantor if he were inclined to be fraudulent or to be guilty of malpractice. In that case the case of *Freshfield* v. *Reed* (2) was referred to, but that case has not much bearing on the present, as it only decided that a consent in writing duly attested, means attested by a witness, and that a consent is not attested simply by the consenting party being a party to the deed to which his consent is required, if his signature to the deed is not attested by a witness. Attestation is not necessary, as was observed in *Seal* v. *Claridge* (1), unless it is required by an instrument creating a power or by some statute; and where it is so required, the provisions of the instrument or statute, whether express or implied, must be complied with. Obviously, the requirement of an attesting witness is inconsistent with the grantor attesting his own signature, and we have the authority of the Court of Appeal for going a step further, and saying that a party to the transaction cannot be an attesting witness. It is true that Lord Selborne fortifies his conclusion in that particular case by considerations drawn from the language of the statute, which in that case required an attesting witness; but we think it is impossible to read his judgment without understanding it as laying down the general rule stated above. It is true that no authority in English law can be found for the proposition, which is probably due to the fact that the far wider

(1) 7 Q. B. D. 516. (2) 9 M & W. 404.

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rule excluding witnesses on the ground of interest, obscured the narrower but far more reasonable rule incapacitating a party to the transaction from being an attesting witness. This rule has, however, as it seems to us, a somewhat more definite legal origin than the general consent of mankind. In the Roman law of wills, the heir was supposed to buy, and the testator to sell, the succession and family, and the ceremony was transacted openly, with all the symbols of a sale, in the presence of an officer and of a certain number of witnesses. While the testament per æs et libram continued, neither the testator nor heir, nor any of the families of either, could be a witness, because they were supposed to be the parties to the contract. When the symbolical sale ceased, and testaments were in writing and secret, the heir himself was considered to be a competent subscribing witness, and afterwards, when the will was open, the heir was still looked upon as a competent witness, though he knew the contents. Gaius, however, reprobated this custom, and Justinian pronounced it illegal. The words of the Institute on the point are: "Sed neque heres scriptus neque is qui in potestate ejus est, neque pater ejus qui eum habet in potestate, neque fratres qui in ejusdem patris potestate sunt, testes adhiberi possunt, quia totum hoc negotium quod agitur testamenti ordinandi gratiâ, creditur hodie *inter testatorem et heredem agi*."—Instit. lib. 2, tit. 10, § 10. Justinian, however, did not interfere with the competency of legatees or persons intrusted with fidei commissa, who had always been regarded as strangers to the transaction. Now, this general rule or principle excluding those who are parties to the transaction from being competent attesting witnesses, would clearly apply, as in *Seal* v. *Claridge* (1) it was held to apply, to the grantee of a bill of sale, and incapacitate him from being an attesting witness to the bill of sale. Does this principle apply to the case of a proxy? There is, indeed, no contract between the creditor and the proxy such as was supposed originally in the Roman law to exist between the testator and the heir, nor is the proxy a party to the document, or required to sign it, nor does he take any beneficial interest under it. But, as he is the donee of the power conferred by the instrument, we do not see how it

(1) 7 Q. B. D. 516.

can be said that he is a stranger to the transaction. It must also be remembered that the witness in the case of a blind or illiterate creditor has duties to perform with reference to the proxy beyond that of attesting the mark of the creditor. Such duties seem to require the presence of an independent person other than the donee of the power, and it would be inconvenient to lay down a different rule as to the person who could be an attesting witness in the two cases. With the object or policy of requiring an attesting witness, and, if one is required, of limiting his duty to attesting the signature of the person executing the document, we have nothing to do; but where an attesting witness is required, we have only to follow the law laid down by the Court of Appeal in *Seal* v. *Claridge* (1), and say that at any rate he must not be a party to the transaction. Some difficulty has, no doubt, been thrown in our way by a decision under the Statute of Frauds. By s. 5 of that Act it was required that a devise of lands should be in writing, signed by the devisor and attested by three or four credible witnesses. Under that statute difficulties arose in establishing wills, because a devisee or legatee was incompetent as a witness to the will, but apparently only on the ground that he took a beneficial interest under it. To remedy this state of things the 25 Geo. 2, c. 6, was passed, which, by s. 1, enacted that a beneficial devise, legacy, estate, interest, or appointment to an attesting witness should be null and void, and that such person should be admitted as a witness, notwithstanding such devise, &c. In the case we refer to, a mere executor or trustee, who took no beneficial interest under the will, was held to be a competent attesting witness: *Bettison* v. *Bromley* (2), and see *Goss* v. *Tracy*. (3) This decision purports to be based on earlier authorities; but when those authorities are examined, they only decide that such an executor or trustee is a competent witness at the trial in a matter concerning the estate, and not that he is competent to be an attesting witness. The decision in East appears to be founded on the assumption that the only objection to the competency of an attesting witness was that of interest. This may be accounted for either by the fact that no general rule

(1) 7 Q. B. D. 516. (2) 12 East, 250.
(3) 1 P. Wms. 290.

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rendering a party to the transaction incompetent as an attesting witness was known to the judges who decided that case, or that, following the Roman law, they held it not to apply to persons only interested with fidei commissa. However this may be, we have in *Seal* v. *Claridge* (1) an express and recent decision of the Court of Appeal, laying down a general principle on the subject, and it is not for us to disregard it, or endeavour to whittle it away by one of those fine-drawn and subtle distinctions which are the opprobrium of English law and the despair of all those who seek to evolve from it a rational and intelligible system. The case is one of some difficulty; but, for the reasons given above, we have come to the conclusion that the learned county court judge was right, and therefore we affirm his decision, and dismiss the appeal with costs.

Appeal dismissed.

Solicitors for Mrs. Cullen: *Stephens & Stephens.*

Solicitors for the petitioning creditor: *L. W. Byrne, for Mair & Blunt, Macclesfield.*

J. F. C.

C. A.

May 27.

[IN THE COURT OF APPEAL.]

THE GUARDIANS OF THE PARISH OF BRIGHTON, APPELLANTS; THE GUARDIANS OF THE STRAND UNION, RESPONDENTS.

Poor Law—Removal by Order before the Divided Parishes Act, 1876—*Subsequent Residence without Relief—Settlement—"Pauper removed"*—39 & 40 *Vict. c.* 61, *s.* 36.

The enactment in s. 36 of the Divided Parishes Act, 1876, that the provisions relating to settlement contained in that Act shall not apply to any pauper removed under any order of removal before the passing of the Act, applies only to those paupers who have been so removed, and who remained paupers at the passing of the Act.

CASE stated in an appeal against an order of July 22, 1890, for the removal of Matilda Corbett, a pauper, from the Strand Union, in the county of London, to the parish of Brighton.

The pauper was legitimate and born in the parish of Hove in 1862. By an order of removal of July 13, 1866, it was ad-

(1) 7 Q. B. D. 516.

judged that her last legal settlement was in the parish of Blockley, in the Shipston-on-Stour Union, in the counties of Gloucester, Warwick and Worcester, and she was removed to that union on November 8, 1866. From 1870 to 1881, she lived in service at different houses in the parish of Brighton. She did not at any time during that period reside or sleep elsewhere nor receive poor relief, and she had not since acquired a fresh settlement. In April, 1881, she went to Paris to reside. The order of removal appealed against was made on the grounds that she had resided for upwards of three years continuously up to the year 1881, in the parish of Brighton, and acquired a settlement by such residence in accordance with 39 & 40 Vict. c. 61, s. 34. The appellants' grounds of appeal were (1.) that the pauper was not at the time of the making of the said order, and had never been legally settled in the parish of Brighton; (2.) that the said order of removal and the grounds of removal were defective and bad, because the pauper having been removed from the parish of Brighton to the parish of Blockley, under the order of removal of July 13, 1866, and before the passing of 39 & 40 Vict. c. 61, could not acquire a settlement under the provisions of the 36th section thereof. The respondents contended that the pauper acquired a settlement by three years' continuous residence in the parish of Brighton under s. 34, notwithstanding s. 36. The question was: whether the pauper acquired a settlement by residence and was settled in the parish of Brighton under 39 & 40 Vict. c. 61, and whether an order of removal to Brighton could be validly made under that statute or otherwise.

Lumley Smith, Q.C. (*Gore*, with him), for the appellants. The pauper was a "pauper removed" under an order of removal before the passing of 39 & 40 Vict. c. 61, and therefore by s. 36, the provisions of s. 34 for a settlement by three years' residence do not apply.

Poland, Q.C., and *Alexander Glen*, for the respondents. The contention for the appellants implies that a person once removed as a pauper before the Act, cannot afterwards acquire a settlement under it. Without impeaching the old order of removal,

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it is contended that the pauper could and did subsequently acquire a settlement by residence for three years at Brighton. Sect. 36 relates to a "pauper" and is a proviso on s. 35 to the effect that a "pauper" shall not gain a settlement under it; it has no reference to s. 34 at all. On any construction of s. 36, the woman's last place of settlement before she again became a pauper was in Brighton. The appellants must contend that that settlement in some way vanished when she again became a pauper. But s. 36 relates only to a person who was a pauper when removed and continued a pauper. In *Westbury-on-Severn* v. *Barrow-in-Furness* (1) Cleasby, B., said: "The 36th section enacts that the provisions as to settlement (including necessarily the 35th section) shall not take effect where there has been an order of removal, &c., which is as much as saying that they shall take effect and replace the old law in general, but not where the old law has been acted on." Up to the date of the Act the old settlements were to have effect, afterwards the new law which got rid of many questions as to settlement was to operate. Sect. 36 was a saving clause for then existing orders of removal and then existing paupers. It was to prevent poor law guardians from contending that previous orders of removal or their agreements for a settlement were abolished. But the section was not meant to be a disqualification clause.

Lumley Smith, Q.C., for the appellants. The intention of s. 36 was to prevent s. 34 applying to the persons referred to in s. 36. The object of the Act was to create a new kind of settlement, viz., by three years' residence. But the advantages of ss. 34 and 35 were not given to every one. Sect. 36 excepts four classes. Two of them are of persons removed before the Act, and two are of persons who were in course of removal. If a pauper is removed before the Act, he comes within the exception, and not the less so because he may have ceased to have relief after removal; and if a person resident in one parish was in receipt of relief from another, the provisions as to three years' residence will never apply to him. Sect. 34 is not retrospective: *Reg.* v. *Guardians of Ipswich.* (2) That decision, although criticized, has never been reversed, and has been confirmed in *Guardians of*

(1) 3 Ex. D. 88, at p. 93. (2) 2 Q. B. D. 269.

Sunderland v. *Clerk of the Peace for Sussex.* (1) Sect. 36 was not in question in *Reg.* v. *Guardians of Ipswich* (2), for there had been no previous order of removal. There is nothing in s. 36 to shew that the pauper must continue in receipt of relief. The fact that parish relief had been discontinued for a few days, during which the person might have been self-supporting, should not remove him from the category of pauper, and prevent s. 36 from applying. The words "pauper removed" were apparently taken from the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79, s. 7), and mean merely a person who has been removed.

Cur. adv. vult.

April 17. A. L. SMITH, J. By order of removal, dated July 13, 1866, Matilda Corbett, an infant of about four years of age, and a pauper, was removed with her mother from Brighton to the parish of Blockley, in the Shipston-on-Stour Union, such then being her place of legal settlement. Four years after this, in the year 1870, she returned to Brighton, and from that year till April in 1881 she continuously resided there, and thus attained the privilege of irremoveability therefrom. In April, 1881, she broke her residence in Brighton, and went to Paris, and ultimately, in the year 1890, she became chargeable to the Strand Union. The question is, under these circumstances, to where is she now to be removed—to Brighton or to Blockley? The justices decided to Brighton, and hence the present appeal. Apart from the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), she would be removeable to Blockley, such being her last place of legal settlement. She had only acquired the privilege of irremoveability from Brighton whilst she continued to reside there, and this privilege she lost when she broke her residence and went to Paris in 1881. But it is said by the respondents that s. 34 of the Divided Parishes Act of 1876 gave her a settlement in Brighton by reason of three years' residence there. The material parts of s. 34 of the Act of 1876 are as follows: "Where any person shall have resided for the term of three years in any parish, and under such circumstances as would render him irremoveable, he shall be deemed to be

(1) 8 Q. B. D. 99. (2) 2 Q. B. D. 269.

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settled therein, until he shall acquire a settlement in some other parish by a like residence." This Act came into operation on August 15, 1876. At this date Matilda Corbett had resided in Brighton for six years, and she continued to reside there for four more years before she broke her residence, under circumstances which gave her unquestionably a settlement in Brighton under this section, whether the three years' residence is to be computed before or after the passing of the Act. This is clear. But it is said that s. 34 does not apply to Matilda Corbett at all because of s. 36, and it is upon the true construction of this section that this case hangs. Sect. 36 is as follows: "The provisions relating to settlement shall not apply to any pauper removed under any order of removal, or without such order under the provision in that behalf contained in the Union Chargeability Act, 1865, before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act." This section comprises four cases to which s. 34 is not to apply. The first case to which it shall not apply is, to any pauper removed by order of removal before the passing of the Act. The second case is, to any pauper removed by consent before the passing of the Act. The third case is, to any pauper in receipt of non-resident relief. The fourth case is, to any pauper in respect of whom any order of removal shall be pending at the time of the passing of the Act. It will be noticed that s. 36 changes the phraseology of the party dealt with in ss. 34 and 35 from "person" to "pauper," and also that cases one and two deal with matters which had occurred before the passing of the Act, and not after; the case three apparently deals with matters at any time occurring, whether before or after the passing of the Act; and case four to matters occurring at the time of the passing of the Act.

Therefore in this section there are different ways in which the word "pauper" may be read. In cases one and two the word may mean any person being a pauper before or at the time of the passing of the Act, it cannot mean being a pauper after the passing of the Act. In case three it may mean being a pauper before, at the time, or after the passing of the Act. In case four it must mean being a pauper at the time of the passing of

the Act. Then what is the true reading of the word "pauper" when applied to the present case? Is it to be read so as to take away the settlement unquestionably given by s. 34 if the section stood alone as "Any person being a pauper at any time before the passing of the Act," or is it to be read so as to leave her with the settlement conferred by s. 34, i.e., "Any person being a pauper at the time of the passing of the Act"? It is the last reading which I prefer to apply to this case.

It may well be that the legislature, by cases one and two in s. 36, intended to prevent the settlement of one who was a pauper when the Act passed, and whose legal settlement had been then determined either by adjudication or consent, from being ripped up and the new settlement given by s. 34 placed in its stead, and indeed this appears to me to have been the intention of the legislature, and that it did not intend that a person, as here, removed when an infant should never thereafter attain the benefit of the new settlement by residence conferred by s. 34, that is what is contended for by the appellants. I am aware that there are decisions upon the Act which have said that in some instances at any rate the Act is not retrospective, but for the reasons above I have come to the conclusion that the word "pauper" in s. 36, in cases one and two, is to be read as "pauper at the time the Act was passed," and in my opinion the judgment of the justices was correct, and this appeal must be dismissed.

GRANTHAM, J. I am of the same opinion. The question to be determined arises as to the removal of a pauper named Corbett from the Strand Union to the Brighton Union. No dispute arises on the facts; but the legal effect of those admitted facts upon the settlement of the pauper is dependent entirely on the construction of the 34th and 36th sections of the 39 & 40 Vict. c. 61, and it is in construing the words "pauper removed" in the 36th section that the difficulty has arisen. Sect. 34 of that Act would give her, on the admitted facts, a settlement in the appellants' union, but it is contended that s. 36 prevents s. 34 applying to the case of this pauper, and if it has that effect, then the pauper would have to be removed to the

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Shipston-on-Stour Union in Gloucester, Warwick, and Worcester, and the appellants would succeed in preventing her being sent to the Brighton Union. Let us see, therefore, what the 36th section, on which so much depends, refers to, and what class of persons it was intended to exclude from the benefit of the new settlement created by s. 34. Going back some years in the law of settlement, residence per se may be said to have given no settlement in a particular parish, and great hardship was often inflicted on paupers who were removed from parishes where they had long resided, and where all their relatives and friends lived, and who were sent to some parish to which they were absolute strangers because that parish was the last place of their legal settlement. To obviate this hardship an alteration was made in the law of settlement by making a pauper irremoveable if he or she had resided five years in one parish, and that period was subsequently reduced to three. In effect, therefore, those alterations gave persons settlements for the time being in the place in which they then resided, if they had resided a sufficient time, but they lost those settlements on removal from it. Then came this Act of 39 & 40 Vict. c. 61, passed for other purposes, but in which certain sections and the section now in question were introduced for the purpose of still more improving the position of the pauper population and of lessening still more the difficulty of tracing paupers' settlements, and, by this Act, the effect of three years' residence is enlarged from merely giving a status of irremoveability to that of creating in itself a new settlement for the person which would override prior settlements, in case of the person becoming a pauper, and would last until some other settlement from residence or otherwise was obtained by the person so become a pauper. By s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremoveable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed with-

out such corroboration as the justices or court think sufficient." But the legislature did not stop there by creating merely a new basis of settlement, but by s. 35 destroyed an old form of settlement, and thereby still more reduced the hardship of removal of paupers, and still more limited the difficulties of determining settlements by abolishing derivative settlements except in the two cases therein excepted, and it is necessary to remember the effect of this 35th section to properly understand the 36th section, and to interpret the words "pauper removed" which have created the difficulty in this case. "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born"

Now, as under this 35th section derivative settlements were generally abolished it would have been possible for the union to which a pauper had been removed under a derivative settlement abolished by this section to at once apply to the parish in which he had obtained a prior legal settlement to take the pauper back there because, this particular settlement being abolished, there was no liability in them to maintain him. To obviate the liability to this claim to return paupers, s. 36 provides that "paupers removed" before the passing of the Act are not to be affected by this alteration of the law. Now let us look at the position of Matilda Corbett. Was she a person whose status was affected by this Act? At the time of the passing of the Act she had resided for six years, at least, in the parish of Brighton and

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had long become irremoveable. She had therefore obtained a de facto settlement in Brighton, prior to the passing of this Act, all the time she remained there, and that temporary settlement was by the Act created into an absolute settlement. Even if she had not obtained such settlement on the passing of the Act, she resided in Brighton long enough after the passing of this Act to gain a new settlement. Now, it is said that by s. 36 she is excepted from this benefit because when she was a child she had been removed to the Shipston Union. "The provisions relating to settlement shall not apply to any pauper removed under any order of removal, or without such order under the provision in that behalf contained in the Union Chargeability Act, 1865, before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act."

Now, to whom do these exceptions apply? In my judgment to paupers who were then paupers. The section applies to three classes of paupers: paupers removed, paupers non-removed, but whose place of settlement was admitted, and paupers about to be removed. The section, in fact, applies to those then liable to be called paupers. Was Corbett a pauper within either of these classes? Certainly not. She was a person under s. 34, and was not, and, as far as any one could then tell, never would be again a pauper. It is true she had been a pauper who had been removed to the place of her settlement years before, but she had long purged herself of the title "pauper," and if the legislature had intended to exclude in after years persons who once had been but had long ceased to be paupers from the benefits of the Act, the language used would have been "shall not apply to any person who has ever been a pauper and was removed under any order of removal." Why should the legislature have excluded from the benefit of the Act all persons who had or might have the right to this new settlement merely because they might some years before have been removed under an order of removal, but had long ceased to be a burden under such order of removal? It could not be to save expenditure on litigation, because it would reopen the question of settlement in some other parish that might have been obtained since the original removal. I can see

no reason for it. In my judgment that exception to be found in s. 36 was not intended to affect the status of a person not then a pauper who had then or should afterwards become irremoveable, but was only intended to prevent an order of removal then in force from being upset by any of the alterations made by the 34th or 35th sections. Let us assume a person not a pauper at the time of the passing of the Act gaining a settlement by three years' residence fifty years afterwards, but who many years before the Act—twenty or thirty, perhaps—had been removed to the place of his or her settlement for a few days, or a few years, even, and had then ceased to be a pauper, and left the place of settlement to which he or she had been removed, can it be said that that person fifty years after the passing of this Act was a "pauper removed" before the passing of the Act, and was to be deprived of the benefits of the Act? In my judgment the words "pauper removed" as distinguished from the word "person" used in the other two sections refer to the status of the person at the time of the passing of the Act. "Persons" not "paupers" were intended to be benefited. "Paupers" whose irremoveability was lost, and who had been removed by an order of removal then in force were not to be allowed to apply to the Court and say, "We claim to go back under the provisions of this Act to the place where we resided and from which we were removed, because the settlement under which we were removed being destroyed, the order of removal must be quashed;" nor could the servient union make a demand to be relieved of the burden of maintaining the pauper, and so send him back to the place from which he had been removed. "Pauper removed" under an order of removal has reference then to the existing status of the pauper, it indicates time, present position, and place; first, "a pauper," second, "removed," third, then in the place to which removed. If Matilda Corbett had been removed to Shipston-on-Stour after her long residence in Brighton and before the passing of the Act, and she was then living there she would have been a "pauper removed" before the passing of the Act, but when these proceedings commenced and this Act was first applied to her, she was not a "pauper removed." She was a pauper living in the Strand Union and whom the Strand Union wanted to remove to Brighton.

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If the contention of the appellants is correct the benefits of the Act were not only not retrospective, but only prospective to such a limited extent that they were never to come into operation during the lives of any persons who had ever been removed under any order of removal. If that had been its intention, how easy to have said so! As far as I am aware this particular question has never been the subject of legal decision, but it is said that the case is governed by the decision of the Court in *Reg.* v. *Guardians of Ipswich* (1), in which it was held that the Act was not retrospective. But in that case an attempt was made to rely on a three years' residence, broken and put an end to many years before the coming into operation of the Act. And every word in the judgment of Cockburn, C.J., is consistent, and only consistent, with my judgment of the law as applied to this case.

The only way in which that case can be used against my construction is, that if that case was good law, it is said, they need not have inserted the exceptions in s. 36, unless they were inserted to restrict the operation of s. 34 in a case like the present; but that is not so, because the exception was required to prevent orders of removal on derivative settlements abolished under s. 35, from being quashed in consequence of derivative settlements generally being destroyed by that section. For these reason, therefore, my judgment is in favour of the respondents.

J. R.

The Brighton Guardians appealed.

Lumley Smith, Q.C., and *Gore*, for the appellants.
Poland, Q.C., and *Alex. Glen*, for the respondents.

The arguments of counsel and the cases cited were the same as in the Divisional Court.

LORD ESHER, M.R. The question which we have to determine depends entirely upon the construction of s. 36 of the Divided Parishes Act, 1876, in construing which we must adhere to the ordinary rule of giving its clear grammatical construction

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to the language, a rule from which we have no right to depart unless there is something in the section which compels us to do so; a statute is not to be construed in the light of what the Court may think the legislature intended, and words must not be read in in order to enable it to do so. In the present case we find a change of expression in the statute, a change which was noticed in the judgment of the Divisional Court, and which enables us, not to add anything but, to construe a word used in the Act and to expand its meaning. Now, ss. 34 & 35 of the Act are made applicable to a "person," an expression which in s. 36 is altered to "pauper"; and it is a rule of construction that where in the same Act of Parliament, and in relation to the same subject matter, different words are used, the Court must see whether the legislature has not made the alteration intentionally, and with some definite purpose; primâ facie such an alteration would be considered intentional.

We have to determine, then, whether "pauper" in s. 36 has a different meaning from "person" in ss. 34 & 35, and I am clearly of opinion, after hearing the arguments and reading the judgments of the Divisional Court, that "pauper" means something different from "person." If so, what does "pauper" mean in s. 36? What class of persons does it include? It means a person who is a pauper, and only so long as he is a pauper. If that is so, the enactment that the provisions relating to settlement are not to apply to any "pauper" means that they are not to apply to any person who is a pauper, that is to say who is a pauper at the passing of the Act; in other words, they are not to apply to him as long as he fulfils the description of "a pauper removed before the passing of the Act." It follows therefore that this exception in s. 36 does not apply to a person who was not a pauper at the passing of the Act, and that is really sufficient to determine the present case, for Matilda Corbett was admittedly not a pauper at that date. The language of the section embraces only a pauper who has been removed under an order of removal, and is therefore still a pauper under that order. If a person is no longer a pauper under that order, he must have ceased to be a pauper, and he is not dealt with by the section, which applies to a person in a workhouse, who is still a

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pauper under an effective order of removal. The section applies also to a person who is a pauper at the passing of the Act as to whom what may be called a primâ facie order of removal has been made, an appeal from which is pending; but it does not apply to a person who was then in no sense a pauper. A difficulty may be suggested that if it does not so apply, a person who has been a pauper, but has ceased to be one, would be prevented for ever afterwards from obtaining a settlement under s. 34; in my opinion, however, when he ceases to be a "pauper" he becomes a "person," and then comes under s. 34, and may acquire a new settlement under that section.

In coming to the conclusion at which we have arrived, nothing has been added to the language of the section, but the word "pauper" has been expanded to its proper meaning of "a person who is a pauper, and as long as he is a pauper." We break no rule of construction, and we give a different meaning to the words "pauper" and "person." Our decision in no way interferes with that in *Reg.* v. *Guardians of Ipswich.* (1) The judgment of the Divisional Court, depending as it does upon the same principles as those which I have pointed out, must be affirmed.

LOPES, L.J. I am of the same opinion. The sole question is as to the construction of s. 36. It is clear that the pauper had her last legal settlement in Brighton under s. 34, unless she was prevented by s. 36 from acquiring such settlement. The language of the Act is not easy to construe. Sects. 34 and 35 introduced great changes into the law of settlement, and the object of s. 36 was to create a kind of saving clause, seeing that difficulties might arise with regard to existing orders of removal and to pending proceedings; I can entertain no doubt that the expression "the provisions relating to settlement" in s. 36, includes the provisions both of s. 34 and s. 35.

As regards the meaning of the word "pauper," I agree with the Master of the Rolls; it means "a person who shall be a pauper." When? Obviously at the passing of the Act. It is to be remarked that four different cases are dealt with in s. 36; first, a pauper at the passing of the Act who had been removed before the Act and

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was still a pauper; secondly, one who had been removed, not under any order, but simply by consent under the Act of 1865; thirdly, to a pauper in receipt of non-resident relief, that is, where there had been an admission by another parish of his chargeability to it; and fourthly, to a pauper in respect of whom an order of removal was pending, that is, where a primâ facie order of removal had been made, but no actual removal had taken place. The reference in the section is entirely to persons who were paupers at the passing of the Act; all the four classes named are such persons, and it is clear that Matilda Corbett does not answer to that description; at the passing of the Act she was not a pauper, but was a person who had a right to the benefit of the provisions as to acquisition of settlement contained in s. 34. Even if she had been a pauper at the passing of the Act, it does not seem to me that she would have been incapacitated from ceasing to be a pauper.

KAY, L.J. I agree. There does not appear to me to be any real difficulty in the construction of s. 36. The Act of Parliament is describing the status of the individual, and primâ facie it refers to those individuals who have that status at the time the Act is passed. Sect. 36 is one of a group of sections, two of which speak of a "person," while this one speaks of a "pauper," and the language appears to me to have been advisedly altered. The word "pauper" describes the status of the person; the section includes all persons who are in the status of paupers. To what time are we to refer that status? I can only refer it to the passing of the Act. The appellants want to add to or alter the language of the section, and to say that it applies not to a person having that status at the passing of the Act, but to one who has at some time been a pauper, and against whom an order of removal has been made before the Act. That seems to me to be contrary to the purpose with which the statute was passed, and the contention of the appellants comes to this, that if an order of removal had ever been made against a person, and yet he was not a pauper when the Act was passed, he could never take advantage of the provisions of s. 34. I cannot assent to this construction; it seems to me to be contrary to the grammatical

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meaning of the section which applies only to persons who are paupers at the passing of the Act.

It was argued on behalf of the respondents that s. 36 did not relate to s. 34; but it is impossible to adopt that contention. Sect. 34 is the first of a group of sections headed "Provisions relating to settlement." If the appellants were otherwise right, s. 36 would exclude Matilda Corbett from the operation of s. 34; but as I have come to the conclusion that they are not otherwise right, that question does not arise. As to the case of persons who subsequently become paupers I desire to reserve my opinion.

Appeal dismissed.

Solicitors for appellants: *Clarke & Calkin, for Somers Clarke, Brighton.*

Solicitors for respondents: *J. C. Button & Co.*

W. J. B.

April 29, 30; *May* 15.

FORTESCUE *v.* THE VESTRY OF ST. MATTHEW, BETHNAL GREEN.

Metropolitan Building Acts—Metropolitan Building Act, 1855 (18 *&* 19 *Vict. c.* 122), *s.* 26—*General Paving* (*Metropolis*) *Act,* 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 72—*Metropolis Management Act,* 1855 (18 *&* 19 *Vict. c.* 120), *s.* 119—*Street—General Line of Building—Projections—Pilaster encroaching on Public Footway.*

By 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), s. 72, power is given to the persons having the control of the pavements of streets in the metropolis to regulate or remove all projections from the fronts of houses which in their judgment are inconvenient or incommodious to passengers along the footways, and a penalty of not less than forty shillings nor exceeding five pounds is imposed upon any owner or occupier who does not immediately remove any such projection after notice so to do.

By s. 119 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), it is enacted that if any projection placed in front of any house after the commencement of the Act shall be an annoyance in consequence of the same rendering less commodious the passage along any street, the vestry may give notice to the owner or occupier to remove such projection, and that if he shall neglect within fourteen days after the service of such notice upon him to remove such projection he shall forfeit a sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during which the projection continues after the date of his conviction.

By s. 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), "The following rules shall be observed as to projections . . . . (2.) In any

street or alley of a width greater than thirty feet any shop front may project ten inches and no more. (5.) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of . . . . cornices . . . . and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street except with the permission of the Metropolitan Board of Works."

The appellant built upon the side of a public street, which was of a width greater than thirty feet, certain shops upon ground of which he was lessee, and erected against the fronts of the shops certain pilasters which projected into the street beyond the general building line to the extent of nine inches of the footway. The respondents passed a resolution declaring the pilasters to be inconvenient and incommodious to passengers along the footway, and served the appellant with a notice to remove them forthwith, and upon his neglecting to comply with the notice took out a summons against him under s. 72 of Michael Angelo Taylor's Act. The magistrate convicted the appellant:—

Held, that the conviction must be quashed on the grounds:—

1. That s. 119 of the Metropolis Management Act, 1855, was inconsistent with and impliedly repealed s. 72 of Michael Angelo Taylor's Act, and that consequently, assuming the projections in question were unlawful, the proceedings had been taken under the wrong Act.

2. That the projections in question were not unlawful, for that s. 26 of the Metropolitan Building Act, 1855, authorized projections beyond the general building line (to the limited extent therein specified) whatever the position of the building line might be, and not only where the building line being set back from the street the projections were capable of being made on private land.

Vestry of St. Mary, Islington v. *Goodman* (23 Q. B. D. 154) overruled.

CASE stated by a Metropolitan Police Magistrate.

A complaint was preferred by the respondents against the appellant under s. 72 of Michal Angelo Taylor's Act (57 Geo. 3, c. xxix.), for having unlawfully erected six pilasters upon the public footway in Green Street, Bethnal Green, in front of houses erected by him lying between Chester Street and Chester Place, which pilasters in the judgment of the respondents were inconvenient and incommodious to passengers along the said footway, and for having neglected to remove the said pilasters as required by notice by the respondents served on him.

On the hearing of the complaint, it appeared that in the years 1886–1887 the Metropolitan Board of Works acquired under a local Act (Metropolitan Streets Improvement Act, 1883), land on the north side of Green Street, Bethnal Green, then covered by buildings, for the purpose of widening Green Street.

The street was accordingly widened, the added portion was thrown open to the public, and thereupon, under the provisions

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of the said local Act, it came under the control and jurisdiction of the respondents. The street as widened was of a greater width than thirty feet. The appellant who was lessee under the Metropolitan Board of Works of certain plots of land on the north side of Green Street, portion of the surplus land acquired by the Board for widening the street, erected thereon seven shops, and as part of the front of such shops erected six pilasters which projected beyond the general line of buildings to the extent of nine inches of the footway of the street. The respondents passed a resolution declaring that the pilasters erected by the appellant were in their judgment inconvenient and incommodious to passengers along the footway, and served upon him a notice of such resolution requiring him forthwith to entirely remove the pilasters. The appellant having neglected to comply with the notice, the respondents preferred the complaint above mentioned. At the hearing, it was objected on behalf of the appellant (inter alia) that s. 72 of Michael Angelo Taylor's Act was impliedly repealed by s. 119 of 18 & 19 Vict. c. 120, and was expressly repealed or varied by s. 26 of 18 & 19 Vict. c. 122. (1) The magistrate overruled both objections, and convicted the appellant subject to a case.

(1) 57 Geo. 3, c. xxix., s. 72, enacts: "That it shall be lawful for the commissioners or trustees, or other persons having the control of the pavements of the streets and public places in any parochial or other district within the jurisdiction of this Act, and for their surveyor or surveyors of pavements .... to regulate or remove, in such manner as he or they shall from time to time judge proper ...., any fixed or moveable projections .... from the fronts or sides of any house or houses, or other buildings .... in or abutting upon or contiguous to any streets ...., which, in the judgment of the said commissioners, &c., are inconvenient or incommodious to the passengers along the carriage or footways of the said streets"; and provides that any owner or occupier who being required by notice from the said commissioners, &c., to remove any such projection shall not "immediately remove" it, shall "forfeit and pay a sum not being less than forty shillings nor exceeding five pounds."

By 18 & 19 Vict. c. 120, s. 119: "If any porch .... or any other projection or obstruction, placed or made against or in front of any house or building after the commencement of this Act shall be an annoyance in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street in their parish or district, it shall be lawful for the vestry or district board to give notice in writing to the owner or occupier of such house or building, to remove the

The case in consequence of the difference of opinion in *Vestry of St. Mary, Islington* v. *Goodman* (1) was ordered to be argued before a specially constituted Divisional Court.

R. G. Glenn, for the appellant. Assuming that the erection of pilasters projecting to the limited extent of nine inches upon the footway of a street more than thirty feet wide is unlawful, the proceedings have been taken under the wrong Act. Sect. 72 of Michael Angelo Taylor's Act is impliedly repealed by s. 119 of the Metropolis Management Act, 1855. The nuisance struck at by both sections is substantially the same, but the procedure for remedying it in the two sections is different. Under the one the street authority may give notice to remove the projection immediately, under the other the offence is not complete till after the expiry of fourteen days. Again, the penalties under the two Acts differ. It cannot have been intended that the vestry should be entitled to proceed under either Act at their option. The latter was intended to be in substitution of the former.

Secondly, the erection of these pilasters was not unlawful,

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projection or obstruction, or to alter the same in such manner as the vestry or board think fit; and such owner or occupier shall, within fourteen days after the service of such notice upon him, remove such projection or obstruction, or alter the same in the manner directed by the vestry or board: and if the owner or occupier .... neglect or refuse within fourteen days after such notice, to remove such projection or obstruction, or to alter the same in the manner directed by the vestry or board, he shall forfeit any sum not exceeding 5*l.*, and a further sum not exceeding 40*s.* for every day during which such projection or obstruction continues after the expiration of such fourteen days from the time when he may be convicted of any offence contrary to the provisions hereof."

By s. 73 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102): "The powers of improving and regulating streets and for the suppression of nuisances contained in the Act of 57 Geo. 3, c. xxix. .... shall, so far as the same is in force and is not inconsistent with the provisions of the recited Acts and this Act, extend and apply to the metropolis."

By 18 & 19 Vict. c. 122, s. 26: "The following rules shall be observed as to projections: (2.) In any street or alley of a width greater than thirty feet, any shop front may project ten inches and no more. (5.) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of .... cornices .... and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street except with the permission of the Metropolitan Board of Works."

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it is expressly permitted by s. 26 of the Metropolitan Building Act, 1855. The words of that section are perfectly general, and allow projections beyond the building line just as much where that line is brought up to the boundary of the street as where it is set back from the street. In *Vestry of St. Mary, Islington* v. *Goodman* (1), it was indeed held by Denman, and Hawkins, JJ., against the opinion of Lord Coleridge, C.J., that that section operated only as an exception from the prohibition against transgressing the building line on the builder's own land. But that case was wrongly decided and should be overruled.

Dickens, for the respondents. Sect. 72 of Michael Angelo Taylor's Act, and s. 119 of the Metropolis Management Act, 1855, are not inconsistent, and may well stand together. The fact that different procedure and penalties are provided by the latter section, is not enough to make it repeal the former. In *Middleton* v. *Crofts* (2) Lord Hardwicke laid it down that "subsequent Acts of Parliament in the affirmative giving new penalties, and instituting new methods of proceeding, do not repeal former methods of proceeding and penalties, ordained by preceding Acts of Parliament, without negative words." See too *Hill* v. *Hall*. (3) Here the later section contains no negative words. But even if it did operate to repeal s. 72, that section is revived by s. 73 of the still later Act 25 & 26 Vict. c. 102, which applies the provisions of Michael Angelo Taylor's Act to the whole metropolis.

As to the other point, the case of *Vestry of St. Mary, Islington* v. *Goodman* (1) was correctly decided for the reasons given by Hawkins, J.

Glenn, was not called on to reply.

Cur. adv. vult.

May 15. The judgment of the Court (Lord Coleridge, C.J., Mathew, Cave, Smith, and Charles, JJ.), was delivered by

CHARLES, J. In this case a summons was taken out by the respondents against the appellant under 57 Geo. 3, c. 29, commonly known as Michael Angelo Taylor's Act, charging him

(1) 23 Q. B. D. 154. (2) 2 Atk. 675.
(3) 1 Ex. D. 411.

with not having removed, to the satisfaction of the respondents, "six fixed pilasters upon the public footway in Green Street, Bethnal Green, lying between Chester Street and Chester Place, which pilasters are, in the judgment of the vestry, inconvenient and incommodious to passengers along the said footway," as required by a notice served on the appellant.

Upon the hearing of the summons it was proved that, in 1886–7, the Metropolitan Board of Works acquired land on the north side of Green Street, then covered with buildings, for the purpose of widening the street, and the street was widened accordingly, thrown open to the public, and handed over to the respondents for the purposes of control, under the provisions of the Metropolitan Streets Improvement Act, 1883 (46 & 47 Vict. c. clxxviii.).

The appellant was lessee, under the Metropolitan Board of Works, of seven shops, built by him under an agreement with the Board, on land on the north side of Green Street, being a portion of the surplus land acquired by them for widening the street. Against the fronts of the shops the appellant had erected six pilasters, which projected into the street beyond the general building line to the extent of nine inches of the footway of the street. The respondents, therefore, passed a resolution declaring the pilasters in their judgment inconvenient and incommodious to passengers along the footway, and a notice was served on the appellant requiring him forthwith to remove the pilasters to the satisfaction of the respondents, but he did not comply with the notice. The respondents, therefore, instituted these proceedings before a magistrate to enforce the penalties imposed in respect of such default by s. 72 of the above-mentioned Act. The appellant contended (amongst other things) that this section was impliedly repealed by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 119; and, further, that the projections complained of were expressly authorized by the Metropolitan Building Act, 1855, s. 26. The magistrate overruled both these contentions, and convicted the appellant, subject to a case. The question reserved for us is whether his decision was correct in point of law.

With regard to the first point raised, it is necessary to examine

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closely the provisions of 57 Geo. 3, c. xxix., s. 72, and of 18 & 19 Vict. c. 120, s. 119. Both Acts deal with the question of paving and management of streets in the Metropolis, and the respondents, the Vestry of St. Matthew, Bethnal Green, are the successors of the "commissioners, trustees, or other persons having the control of the pavements," mentioned in the earlier Act. By s. 72 of that statute it was enacted that "it shall and may be lawful for commissioners or trustees, or other persons having the control of the pavements of the streets and public places in any parochial or other district within the jurisdiction of the Act, and for their surveyor or surveyors of pavements from time to time, and at all times hereafter, to regulate or remove, in such manner as he or they shall from time to time judge proper, all signs, sign-posts, or other posts . . . projecting over any part of either of the footways or carriageways of any of the said streets or public places . . . and all other or any fixed or moveable projections from the fronts or sides of any house or houses, or other buildings in or abutting upon any streets, and which in the judgment of the said commissioners, trustees, or other persons having control of the pavements, or their surveyor, are inconvenient or incommodious to passengers along the carriage or footways," and a penalty of not less than 40*s.*, nor exceeding 5*l.*, is imposed on any owner or occupier who does not "immediately remove" any such projection to the satisfaction of the commissioners, trustees, or other persons having the control of the pavements, after notice from them so to do. Sect. 119 of the later Act enacts that if any "sign, sign-post . . . or any other projection or obstruction placed, or made against, or in front of any house or buildings after the commencement of this Act, shall be an annoyance in consequence of the same projecting into or being made in, or endangering or rendering less commodious the passage along any street in their particular district, it shall be lawful for the vestry or district board to give notice in writing to the owner or occupier of such house or building to remove such projection or obstruction, or to alter the same in such manner as the vestry or board think fit; and such owner or occupier shall, within 14 days after the service of such notice upon him, remove such projection or obstruction, or alter the

same in the manner directed by the vestry or board, and if the owner or occupier of any such house or building neglect or refuse within 14 days of such notice to remove such projection or obstruction, or to alter the same in the manner directed by the vestry or board, he shall forfeit any sum not exceeding 5*l.*, and a further sum not exceeding 40*s.* for any day during which such projection or obstruction continues after the expiration of such 14 days from the time when he may be convicted of any offence contrary to the provisions hereof." Now, it cannot be denied that both these sections cover the offence with which the appellant was charged; but the latter statute differs from the earlier both as to the amount of penalties which may be imposed, and as to the conditions under which it may be recovered. In 57 Geo. 3 the penalty is to be not less than 40*s.* or more than 5*l.* In 18 & 19 Vict., no minimum is fixed, and the magistrate may, if he thinks fit, inflict a merely nominal fine. On the other hand, he has power to impose a penalty, in addition to that originally imposed, for delay in obeying the requirements of the vestry. Again, in the earlier Act, the offender is to remove the projection or obstruction complained of *forthwith* on receipt of the notice; in the later, he has 14 days' grace given him. It appears to us, under these circumstances, to be clear that the appellant can only be dealt with under the later statute. It is true that s. 72 of the earlier Act is not expressly repealed, but it is a well-recognized principle that an Act describing the quality of an offence, or prescribing a particular punishment for it, is impliedly repealed by a later Act altering the quality of the offence, or prescribing another punishment for it. Thus, in *Davis' Case* (1), it was decided by all the judges that the "Black Act" (9 Geo. 1, c. 22), which made killing deer in enclosed ground a capital felony, was repealed by a subsequent statute altering the offence into a misdemeanor, and inflicting a milder punishment. So again, in *Michell* v. *Brown* (2), a statute which imposed a penalty for the offence of throwing ballast into a navigable river, was held to be impliedly repealed by a later statute, which provided a different punishment for the same offence, and a different mode of enforcing it; and Lord Campbell, C.J.,

(1) 1 Leach, 4th ed. p. 271. (2) 1 E. & E. 267.

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in delivering the judgment of the Court, thus expresses the rule which governs such cases: "If," he says, "a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, &c., giving an appeal where there was no appeal before, we think the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence could not be proceeded for under the earlier statute, and the same consequences seem to follow from altering the procedure and punishment. The later enactment operates by way of substitution, and not cumulatively giving an option to the prosecutor or magistrate."

It was suggested, however, that s. 73 of the Metropolis Local Management (Amendment) Act, 1862 (25 & 26 Vict. c. 102), has expressly applied the provisions of the 57 Geo. 3, c. 29, to the whole metropolis, including St. Matthew, Bethnal Green; but that section in terms only applies the old Act "so far as the same is in force and is not inconsistent with the provisions of the recited Act (i.e. 18 & 19 Vict. c. 120), and of this Act," and for the reasons we have given we regard the provisions of s. 72 of the earlier Act inconsistent with those of s. 119 of the later. Upon this ground, therefore, we are of opinion that the conviction must be quashed.

But we think that we ought also to express an opinion on the second point raised. For unless the appellant is correct in his contention that the projections complained of are authorized by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 26, fresh proceedings could at once be taken against him, unless barred by lapse of time, under s. 119 of the Metropolis Local Management Act, 1855. This question has, however, been the subject of judicial decision and of a difference of judicial opinion in a Divisional Court. In the *Vestry of St. Mary, Islington* v. *Goodman* (1), the majority of the Court (Denman and Hawkins, JJ., Lord Coleridge, C.J., dissenting), held that s. 26 of the Building Act, 1855, did not amount to a repeal pro tanto of s. 26 of Michael Angelo Taylor's Act, and that it only authorized projections in cases where but for a statutory prohibition

(1) 23 Q. B. D. 154.

they would be lawful, and did not authorize projections which would interfere with the user by the public of a public footway. The principle of this decision unquestionably applies to the case before us, and were it not that it is a criminal case in which no appeal is possible we should feel bound to act on the judgment of the majority of the Court. But there being no appeal, and the matter being one of general importance, it has been considered right to have the question re-argued before a specially constituted Divisional Court of five members.

The enactment relied on by the appellant (18 & 19 Vict. c. 122), s. 26, is, so far as is material, as follows: "The following rules shall be observed as to projections. . . . . In streets or alleys of a less width than thirty feet any shop-front may project beyond the external wall of the building to which it belongs for five inches and no more, ... and in any street or alley of a width greater than thirty feet any shop-front may project ten inches and no more. . . . . Except in so far as is permitted by this section in the case of shop-fronts . . . . no projection from any building shall extend beyond the general line of fronts in any street except with the permission of the Metropolitan Board of Works." This Act received the Royal assent on the same day as the Metropolis Local Management Act, 1855. By s. 96 of that Act, all streets in the metropolis being highways, are vested in the vestry or district board of the parish or district in which such highways are situate. By s. 119, as has been pointed out, power is given to remove future projections into any street, and by s. 143 (since repealed and re-enacted with some modifications by 25 & 26 Vict. c. 102), it was enacted that "no building shall without the consent in writing of the Metropolitan Board of Works be erected beyond the regular line of buildings in the street in which the same is situate in case the distance of such line of buildings from the highway do not exceed thirty feet or within thirty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway." Now this section certainly imposes a restraint upon a building owner in the use of his own land and forbids projections within

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specified limits, without the consent of the Metropolitan Board, beyond the general building line, and in the *Vestry of St. Mary, Islington* v. *Goodman* (1), the majority of the Court considered that s. 26 of 18 & 19 Vict. c. 122, did no more than relieve him from this restriction so far as his own land was concerned. But it is to be observed that there is not either in the Metropolis Local Management Act, 1855, or the Amending Act of 1862, which gives authority to the architect of the board to fix the general building line, anything to prevent that building line from being brought up to the line of the highway of the street itself; and in many instances the building line does actually adjoin the highway. In all such cases the permission granted by s. 26 of 18 & 19 Vict. c. 122, for projecting shop-fronts seems to carry with it of necessity the right to build to the extent mentioned in the section on the soil of the street itself, which belongs not to the building owner, but to the vestry or district board. And with the sincerest respect for the judgment of the majority of the Court in the *Vestry of St. Mary, Islington* v. *Goodman* (1), we think that this is the true construction of the words. They are perfectly general and unqualified, and appear to us to have a universal application and to authorize these trifling projections as well in the case where, if built at all, they are necessarily built on the street itself, as in the case where owing to the building line being set back from the street they can be built on the owner's own land. The more limited construction is, we think, inconsistent with the language used. The building owner is, in our opinion, thereby authorized to make the projection to the limited extent allowed whatever be the position of the building line. It gives him a statutory right in case the building line coincides with the boundary of his land, to extend his shop-front beyond it, and does not operate merely to remove the statutory prohibition against transgressing the building line on his own land. So far, therefore, as shop-fronts are concerned, it sanctions an encroachment on the footway to the extent of ten inches, and exempts the building owner from the obligation of removing the projections under s. 119 of 18 & 19 Vict. c. 120.

(1) 23 Q. B. D. 154.

We may add that one of the cases referred to in the judgment of Denman and Hawkins, JJ., *Goldstraw* v. *Duckworth* (1) furnishes an illustration of similar legislation in Liverpool. No doubt the public convenience is to a small extent interfered with by the construction which we regard as the correct one, but the words of the statute do not seem susceptible of any less extended signification. They authorize, in our opinion, in unambiguous terms, the doing of something which in one particular case is inconsistent with the continued existence of the public right. To that limited extent, therefore, the public right is abrogated by the section.

Upon this ground we think that no proceedings can be successfully taken against the appellant under s. 119 of the Metropolis Local Management Act, 1855.

Judgment for the appellant.

Solicitor for appellant: *A. Hughes.*
Solicitor for respondents: *Voss.*

J. F. C.

HOTCHIN, APPELLANT; HINDMARSH, RESPONDENT.

May 6

Adulteration—Sale of Food—Responsibility of Servant of Seller—Written Warranty—Purchase by Servant's Employer under Contract for continuous Supply for a period—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63) ss. 6, 25.

H., who was a servant of the F. Dairies Company, and acting as such, sold to the respondent milk which contained twelve per cent. of added water:—

Held, that H. was properly convicted as a seller of the milk under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63)

The milk in question was consigned to the F. Dairies Company by railway in cans bearing labels which stated that the contents were "warranted genuine new milk with all its cream on. From R. T;" and there was a written agreement between the F Dairies Company and R. T. whereby he contracted to supply them for six months with milk warranted pure and with all its cream on. H. did not test the milk on receiving it, although he had an instrument for the purpose, and frequently tested milk when so received by him:—

Held, that s. 25 of the Sale of Food and Drugs Act, 1875, was not applicable, and that even if it would have entitled H. to be discharged from the pro-

(1) 5 Q. B. D. 275.

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ceedings, he had not established that at the time when he sold the milk he had no reason to believe that its quality was otherwise than as demanded of him by the respondent.

CASE stated by justices upon an appeal against a conviction under the Sale of Food and Drugs Act, 1875.

At a petty sessions for the borough of South Shields the respondent, the sanitary inspector for the borough, preferred an information against the appellant under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), (1) charging him with having on January 21, 1891, sold to the respondent an article of food, to wit milk, which was not of the nature, substance, and quality demanded.

Upon the day in question the appellant was serving milk within the borough from a cart upon which were painted the words: "The Farmers and Cleveland Dairies Company, Limited," and upon the demand of the respondent the appellant served him with three gills of milk, for which the respondent paid to him three pence. The appellant was a local foreman in the service of The Farmers and Cleveland Dairies Company, Limited, and at the time of the respondent's purchase of the milk the appellant stated that he was selling the milk for the company. Upon analysis the milk was certified to contain twelve per cent. of added water.

From the evidence on behalf of the appellant it appeared that on the morning of the day in question two cans of milk arrived at the High Shields railway station, consigned by one Thompson of Dumfries to the Farmers and Cleveland Dairies Company. Each of the cans bore a label in the following terms: "2 cans—34 Impl. Galls. Jan. 20th, 1891. Of warranted genuine new

(1) Sect 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*."

Sect. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution."

milk with all its cream on. From R. Thompson, Dumfries. To The Farmers and Cleveland Dairies Co., Limited, High Shields, Watson." It also appeared that there was no protection against the milk being tampered with on the journey, which was a distance of about ninety miles. The cans were delivered at the above station to an agent of the company, and from him the appellant received for sale a portion of the contents. It was stated that frequently when milk was so received by the appellant he tested it with a lactometer, but that he did not do so on this occasion. The appellant stated that the milk in question was served by him in the same state as he got it from the cans, but he gave no reason for not testing the milk.

The appellant produced a written agreement dated October 1, 1890, between Thompson of the one part, and one Watson, on behalf of The Farmers and Cleveland Dairies Co., of the other part, whereby Thompson agreed to supply the company for six months from that date with genuine good new milk of the best quality, with all its cream on. By the agreement the milk was to be delivered at the station of destination by Thompson, who thereby warranted it to be pure genuine new milk, unadulterated, and with all its cream on.

On behalf of the appellant it was contended that he was not a seller of the milk within s. 6 of the Act, but a mere servant of the Farmers and Cleveland Dairies Company, who were the actual sellers; and, secondly, that, if this were not so, he was protected by s. 25, because the milk had been purchased by the company with a written warranty, and sold in the same state as it was in when received by them, and neither the company nor the appellant had any reason to believe that the nature, substance, and quality of the milk were otherwise than as demanded of the appellant. (1)

The justices found that the appellant had altogether failed to prove that he could not with reasonable diligence have obtained knowledge of the adulteration of the milk; that the warranty relied on, being a mere agreement for a general supply of pure

(1) With regard to the second contention, the respondent consented to the admission in evidence of anything which would have been admissible if the company had been charged instead of the appellant.

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milk, did not satisfy the requirements of s. 25 of the Act; and that there was no evidence to prove that the milk in question was milk supplied under the agreement. They accordingly convicted the appellant.

J. W. Mansfield, for the appellant. First, the master is responsible for his servant's act: *Core* v. *James* (1), and therefore, in this case, the Farmers and Cleveland Dairies Company and not the appellant, should have been prosecuted.

[LORD COLERIDGE, C.J. In *Core* v. *James* (1), the terms of the enactment were altogether different.]

There can be no sale by a person who does not render himself liable on the contract of sale. Here the Farmers and Cleveland Dairies Company were the sellers; the appellant only served the milk, as a shopman serves the articles sold by the shopkeeper. It was not intended that under s. 6 a mere agent, however innocent, should be liable to conviction. When the Legislature wished to provide for the punishment of a person other than the seller, an express provision to that effect was inserted, as in s. 4 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30); so, too, ss. 14 and 15 of the principal Act draw the same distinction between "the seller" and "his agent."

Secondly, if s. 6 of the principal Act is to be construed so as to include this case, then s. 25 must also be construed in such a way as to give to the person who can be convicted as a "seller" under s. 6 the protection afforded to the seller where he is a purchaser of the article under a written warranty. Here the appellant had no reason to believe that the milk was adulterated. The only evidence against him on this point is that he might have used an instrument for testing the milk, and that he did not do so. The justices were wrong in deciding that the warranty relied on was not a sufficient warranty within s. 25; that the written agreement, looked at in connection with the labels on the cans, established a written warranty within the section, is shewn by the decision in *The Farmers and Cleveland Dairies Co.*

(1) Law Rep. 7 Q. B. 135.

v. *Stevenson* (1), where that very point was decided in favour of the same company.

T. W. Chitty, for the respondent. As to the first point, the appellant did sell the milk, whether he sold it as agent or as principal. It is common practice for an agent to report to his principal, "I have sold for you," &c. Possibly, if the statute had used the term "vendor," that might have been construed strictly as meaning the person who has the property in the article.

[LORD COLERIDGE, C.J. We do not feel any difficulty upon that point.]

Then as to the second point, the onus of shewing that the case fell within s. 25 of the Act was upon the appellant, and he failed to establish the point by his evidence. In *The Farmers and Cleveland Dairies Co.* v. *Stevenson* (1) there was an express finding that the milk in question was the identical milk sold under the warranty contained in the agreement coupled with the labels on the cans, and that the milk had not been tampered with on the journey. Here the appellant did not do all he could have done; the failure to test the milk with the lactometer is in itself a justification of the justices, finding as to his belief. Moreover, the decision in *The Farmers and Cleveland Dairies Co.* v. *Stevenson* (1) is contrary to that in *Harris* v. *May*. (2)

[MATHEW, J. There were no express words of warranty in that case.]

The appellant was not the purchaser within s. 25 of the principal Act.

Mansfield, in reply.

[MATHEW, J. If we construe s. 6 as you wish us to do, the guilty person may escape; and if we adopt your construction of s. 25, an innocent person may suffer.]

Pain v. *Boughtwood* (3) shews that these two sections are interdependent, and that if a servant is within s. 6 he must also be within s. 25.

LORD COLERIDGE, C.J. Having regard to the decision in *The Farmers and Cleveland Dairies Co.* v. *Stevenson* (1), the points

(1) 60 L. J. (M.C.) 70. (2) 12 Q. B. D. 97.
(3) 24 Q. B. D. 353.

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involved in this case are not altogether easy of determination. I am, however, clearly of opinion that the conviction must be upheld. We have to deal with ss. 6 and 25 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63). All that it is necessary to decide is, What is the meaning to be placed on s. 6; whether s. 25 applies in favour of all persons who are hit by s. 6; and whether the decision in *The Farmers and Cleveland Dairies Co.* v. *Stevenson* (1) governs this case?

The statute deals with, and is for the prevention of, the adulteration of food and drugs, and it points at particular acts done by particular persons; one of these acts is, under s. 6, the act of selling the adulterated article. Sect. 3 provides that no person shall mix, colour, stain, or powder, or order or permit any other person so to do, any article of food with any ingredient injurious to health, with intent that the same may be sold in that state. This section, therefore, points to physical acts done by the individual. So, also, s. 4 provides for similar acts done in relation to a drug. Both these sections deal with physical acts, irrespective of contract; and when once the act and the intent are found, the offence is complete. I do not overlook the provisions of s. 5; but the point upon which I am laying stress is, that both ss. 3 and 4 are directed against *physical* acts. It is for the magistrates to find the intent with which the act is done; but the act itself is a physical act, and one which the party must know that he is doing. Under these two sections, if the magistrates find the existence of the intent and the commission of the act, and that the case is outside the proviso contained in s. 5, the person doing the act must be dealt with as a principal, even though he is a servant. It cannot be his duty to break the law, and if he knowingly commits the act he is guilty. Coming now to s. 6, we find that it is grouped under the same general heading as ss. 3 and 4, and that it deals with a similar offence. It provides that no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality demanded by such purchaser. In my opinion, a person who takes the article in his hand, and performs the physical act of transferring the adulterated thing to the purchaser, is a person

(1) 60 L. J. (M.C.) 70.

who sells within this section. There is a proviso to the section which specifies four cases in which the offence shall not be deemed to be committed, but none of these cases are here in point. If a person sells the adulterated article, and his case is not within the proviso, he comes within the section. If, therefore, any person transgresses against the provisions of s. 6, be he principal or agent, he falls within that section.

Sects. 12, 13, 14, 15 and 17 all deal with cases in which the article is not bought for purposes of use as food or as a drug, but for the purpose of submitting it to analysis. In s. 14 the words "the seller or his agent selling the article" are used, shewing that a person who does the physical act is a person who sells the article. Difficulties having arisen with regard to the words in s. 6 "to the prejudice of the purchaser," where the article was bought not for use but for such analysis, Parliament interfered and solved the difficulty by passing an amending Act (42 & 43 Vict. c. 30), which provides (s. 2) that for the purposes of a prosecution it is none the less a sale and to the prejudice of the purchaser within the meaning of the earlier Act, although he does not want to consume or use the article. These considerations shew that the Legislature has used the words "sell" and "seller" in this enactment in the widest sense.

Then reliance was placed upon s. 25, and it was said that either that section shewed that the seller under s. 6 must mean the person who was the purchaser of the commodity afterwards sold—that is, in this case, the company—or that if a person might be a seller without himself being the person who in the first instance bought, it must follow that the protection of s. 25 would equally apply to such a seller. This is an ingenious argument, but I am not much pressed by it, because if it were the true meaning, the Act might just as well not have been passed. A fraudulent person would then have nothing to do but to put forward an agent, and both might escape responsibility.

I cannot assent to the introduction of so mischievous an interpretation, the consequence of which would be to destroy the whole value of the Act.

Then it was urged that the Court had held in *The Farmers*

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and Cleveland Dairies Co. v. *Stevenson* (1) that where milk has been purchased from the farmer under a written contract in the manner in which the milk here in question was purchased by this same company, sufficient is shewn to bring the case within s. 25 of the Act. Happily it was not so held by the Court in that case. That decision proceeded upon a different state of facts to those which are before us, and therefore the decision is not an authority in this case. There the magistrate found as facts, that the milk was delivered under the terms of the contract and in pursuance of it; that the appellants had no reason to believe that it was otherwise than of the nature, substance, and quality demanded; and that it had not been tampered with from the time it left the consignors until it was sold to the respondent. Those are important facts which justify the decision, for they exonerated the appellants in that case from all moral guilt or even carelessness. But in this case the magistrates have found that there was nothing to shew that the milk was delivered under the contract with Thompson, or that it was not tampered with in transit. In point of fact there was a transit of ninety miles, during which it might have been tampered with. The magistrates have further found in this case that the appellant failed to prove that he had no reason to believe that the milk was otherwise than as represented—for it appears that he had opportunity to test it, but did not do so, though he had the means ready to hand. Therefore, even if s. 25 applies to this case, which in my opinion it does not, the magistrates have refused to find those facts which are necessary to satisfy the requirements of that section. The conviction must accordingly be upheld.

MATHEW, J. I am of the same opinion, and I have little to add to what my Lord has said. Sect. 6 enacts that "no person shall sell to the prejudice of the purchaser," &c. It is contended that we should read this as "no person unless he be a servant." Why should those words be introduced? It is clear from the series of sections following s. 6 that the Legislature meant to deal with the person who does the physical act. Thus, in s. 17,

(1) 60 L. J. (M.C.) 70.

it is plain that the person exposing the article for sale may be either the principal or the agent. It would be an extraordinary interpretation of the Act to hold that even where it was shewn that the person who did the act was guilty, his employer alone should be liable to be convicted.

Then regard must be had to the difficulty which would arise under s. 25 if the construction contended for by the appellant were adopted. The result might be that while the guilty person would escape, his innocent employer might be convicted.

Appeal dismissed.

Solicitors for the appellant: *J. E. & H. Scott, for William Bell & Sons, Sunderland.*

Solicitors for the respondent: *J. M. Moore, Town Clerk, South Shields.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
May 1.

HUNT *v.* GREAT NORTHERN RAILWAY COMPANY.

Libel—Privileged Occasion—Railway Company—Publication to Company's Servants of Offences committed by other Servants, with Names of Offenders and Punishments inflicted.

The plaintiff was a guard in the service of the defendants, a railway company. The defendants dismissed him, on the ground that he had been guilty of gross neglect of duty, and published his name in a printed monthly circular addressed to their servants, stating in it that he had been dismissed and the ground of his dismissal. The plaintiff brought an action for libel against the defendants:—

Held, affirming the decision of Stephen, J., that the statement was made on a privileged occasion, and that the defendants were not liable.

APPEAL by the plaintiff against the judgment of Stephen, J., at the trial of the action for the defendants.

The action was for libel. The plaintiff was a guard in the service of the defendants. The defendants, in June, 1889, dismissed him from their service, on the ground that he had been guilty of gross neglect of duty. They refused to pay him any wages in lieu of notice, and they published his name (with others) in a printed monthly circular or calendar addressed to

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their servants, stating in it that he had been dismissed, and the nature of the offence for which he was dismissed. The circular was headed: "Great Northern Railway. The staff are informed that the following punishments have been inflicted for serious offences during the month of June." The plaintiff had sued the defendants in the Leeds County Court for wages in lieu of notice, and obtained judgment against them.

Stephen, J., held that the occasion of the publication was privileged. The plaintiff appealed.

Lumley Smith, Q.C., and *T. L. Wilkinson*, for the plaintiff. This case does not fall within any of the rules laid down as to privileged occasions. In order that an occasion should be privileged, there must be a duty or an interest on the part of the person who makes the statement which would otherwise be libellous, and a corresponding duty or interest on the part of the person to whom the statement is made: *Harrison* v. *Bush*. (1) The railway company's staff of servants at their station in London could have no interest in knowing that a particular man had been dismissed by the company at Huddersfield. The company would have been justified in publishing to their servants a list of offences committed by servants and the punishments inflicted for them; but if the names of the individuals who have been punished are published, the privilege is lost, and the statement is libellous. In *Somerville* v *Hawkins* (2), where the defendant had dismissed the plaintiff from his service on suspicion, and the defendant told two others of his servants that he had dismissed the plaintiff for robbing him, it was held that this was a privileged communication, because it was the duty of the defendant and also his interest to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff. That case is distinguishable from the present. There was no reciprocal interest of the company and their servants in a statement by the company that a particular man had been dismissed by them, and it was not fair for the company to publish to all their staff that A. B. had been dismissed for misconduct. The alleged offence was against

(1) 5 E. & B. 344. (2) 10 C. B. 583.

discipline; it was not a moral offence, and the company had no interest in preventing their servants from associating with the man who had committed it.

Murphy, Q.C., Cyril Dodd, Q.C., and *Montagu Lush*, for the defendants, were not called upon.

LORD ESHER, M.R. I can entertain no doubt about this case. There has been a confusion between the question of the use of a privileged occasion with the question whether that occasion had or had not arisen. The point which the learned judge decided was, that the occasion had arisen for the defendants to do what they did,—not that they had used the occasion rightly. If the plaintiff meant to assert that the defendants had used the occasion wrongly, he ought to have insisted that that was the question to be tried, and there ought to have been some suggestion of malice on the part of the defendants, or wilful misuser by them of the occasion. There ought to have been evidence given of that; but there was none, and, therefore, the only question was, whether the occasion had arisen. The occasion had arisen if the communication was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist, the occasion is a privileged one, and the question whether it was or was not misused is an entirely different one.

Can anyone doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that, if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service? I cannot imagine a case in which the reciprocal interest could be more clear. That was the question for the learned judge to decide; and I have no doubt that this appeal, which asks us to say that he was wrong, must be dismissed.

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FRY, L.J. I am entirely of the same opinion. It is clear, in my view, that there was a reciprocity of interest between the railway company and their servants.

LOPES, L.J. I think this case comes clearly within the rule which is stated in Odgers on Libel (2nd ed. p. 238): "Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest," the occasion is privileged.

It is said that the plaintiff's name need not have been mentioned by the defendants, and that the privilege of the occasion was lost because his name was mentioned. That is not so. It might possibly be that the mentioning of his name could be suggested as evidence of malice on the part of the defendants—not that I think the suggestion could be maintained for one moment. But, at any rate, it could only be used as evidence to shew that the defendants had abused the occasion, not that the occasion did not exist. I think the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Elgood & Elgood; Nelson, Barr, & Nelson.*

W. L. C.

C. A.
May 28.

[IN THE COURT OF APPEAL.]

WENMAN *v.* LYON & CO.
HONEYWILL, CLAIMANT.

Bill of Sale—"Marriage Settlement"—Agreement for—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4.

By the Bills of Sale Act, 1878, s. 4, "The expression 'bill of sale,' shall include bills of sale, assignments, transfers, declarations of trust without transfer . . . ., and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels . . . . shall be conferred, but shall not include . . . . marriage settlements":—

Held (affirming the judgment of the Queen's Bench Division), that a memorandum of agreement for a marriage settlement, although informal and not under seal, was a "marriage settlement" within the exception in s. 4, and not a "bill of sale."

APPEAL from the judgment of the Queen's Bench Division reported [1891] 1 Q. B. 634, where the facts are fully set out.

The question arose on an interpleader to try the right to certain furniture seized by the defendants, as execution creditors, under a fi. fa., and claimed by the claimant as trustee under a memorandum of agreement, by which, after reciting the intended marriage of the plaintiff with Jesse Elizabeth Honeywill, it was agreed that if the intended marriage should take effect all the personal chattels of the plaintiff should be assigned to the trustee on certain trusts, and that the plaintiff would, after the solemnization of the intended marriage, upon the request of the wife, execute a proper deed of settlement of the property, with proper clauses for carrying the trusts into effect. The marriage took place, but no deed of settlement was executed.

The county court judge, before whom the interpleader came, decided that the agreement was within the exception of s. 4 of the Bills of Sale Act, 1878, and that the claimant had a right to the goods. On appeal, the Queen's Bench Division affirmed this decision. (1)

The execution creditors appealed.

Lewis Edmunds, in support of the appeal.

J. F. P. Rawlinson, contrà, was not heard.

THE COURT (Lord Esher, M.R., Lopes, and Kay, L.JJ.) affirmed the judgment of the Queen's Bench Division.

Appeal dismissed.

Solicitors for execution creditors: *Stokes, Saunders, & Stokes.*

Solicitor for claimant: *W. F. Stokes.*

(1) [1891] 1 Q. B. 634.

A. M.

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April 14;
May 11.

ROBERTS v. JONES.
WILLEY v. GREAT NORTHERN RAILWAY COMPANY.

Practice—Costs—Trial with Jury—Discretion of Judge—Place of Trial—"For good cause"—Order LXV., *r.* 1.

The plaintiff, who lived in Cheshire, sued the defendant, who lived in Flintshire, for a sum of 640*l.* The plaintiff not naming a place of trial, the action was tried in Middlesex, the defendant not having applied to change the venue. The jury found a verdict for the plaintiff for 200*l.*:—

Ordered, on an application on behalf of the defendant, under Order LXV., r. 1, that the plaintiff should be allowed, as against the defendant, one-third of his costs, such costs to be taxed treating the trial as having taken place at Chester, and that the defendant should be allowed, as against the plaintiff, two-thirds of his costs, such costs to be taxed treating the trial as having taken place in Middlesex.

The plaintiff, who carried on business at Halifax, in Yorkshire, brought an action against the defendants, a railway company, to recover damages for personal injuries and loss of trade sustained by him owing to a collision which occurred on their railway near Halifax, claiming 262*l.* for injuries and 6388*l.* for loss of trade. The plaintiff named Middlesex as the place of trial. The defendants applied to change the venue to Leeds, but the application was refused. The jury found a verdict for the plaintiff for 800*l.*:—

Ordered, on an application on behalf of the defendants, under Order LXV., r. 1, that the plaintiff should have his costs so far as related to the claim for personal injuries, such costs to be taxed treating the trial as having taken place at Leeds, and should pay to the defendants all their costs so far as related to the claim for loss of trade, such costs to be taxed treating the trial as having taken place in Middlesex, and also the difference in the expenses of the defendants' medical evidence arising from the action having been tried in Middlesex instead of at Leeds.

APPLICATIONS to Hawkins, J., for directions as to costs in two actions tried before him with a jury. The facts and arguments sufficiently appear in the judgment.

In *Roberts* v. *Jones*, *Murphy, Q.C.*, and *J. G. Witt*, for the plaintiff; *Bigham, Q.C.*, and *H. Lloyd*, for the defendant.

In *Willey* v. *Great Northern Ry. Co.*, *Sir C. Russell, Q.C.*, and *Joseph Walton*, for the plaintiff; *Murphy, Q.C.*, and *C. M. Lush*, for the defendants.

Cur. adv. vult.

May 11. HAWKINS, J. These two cases were tried before me each with a jury. In each case the plaintiff recovered a sub-

stantial verdict against the defendant, and in each case the defendant's counsel applied to me to exercise the discretion vested in me by Order LXV., r. 1, of the Rules of the Supreme Court respecting costs. These applications were fully discussed before me. They involved matters of such general practical importance that I took time to fully consider the grounds upon which they were based; and, having done so, I will now state the conclusions I have arrived at.

I propose, in the first place, to state the law, as I understand it, upon the question before me. Before the passing of the Judicature Acts, 1873 and 1875, and the making under them of the Rules of the Supreme Court, the costs of all suits in Chancery were in the absolute discretion of the Court or judge. In common law actions, the costs of the action, as a rule, followed the event, and neither the Court nor judge had any control over them. By rule 1 of Order LXV. of the Rules of 1883 (which, for the purposes of the present case, is identical with Order LV. of the earlier rules), a discretion was vested in the Court or judge over all costs, with this proviso, that when any action or issue is tried with a jury the costs shall follow "the event," unless the judge by whom such action or issue is tried or the Court shall "for good cause" otherwise order.

In cases tried by jury, therefore, the existence of good cause for so doing is a condition precedent to the jurisdiction of the judge to exercise any discretion over the costs.

It is impossible to define exhaustively what constitutes "good cause" within the meaning of the rule; for all practical purposes, however, the true principle which should guide in the determination of the question will be found enunciated in the judgments from which I am about to quote. In *Cooper* v. *Whittingham* (1) Sir George Jessel, M.R., used these words: "As I understand the law as to costs, it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts; for instance, there may be misconduct

(1) 15 Ch. D. 504.

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in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind, the rule is plain and well settled, and is as I have stated it."

In *Jones* v. *Curling* (1), the language of Jessel, M.R., was quoted with approval by the present Master of the Rolls (Lord Esher), who, referring to it in his judgment (at p. 268), said: "Taking that as the groundwork of what should constitute good cause within this order, it seems to me that the facts must shew the existence of something, having regard either to the conduct of the parties or to the facts of the case, which makes it more just that an exceptional order should be made, than that the case should be left to the ordinary course of taxation. For example, if the facts shew that there has been misconduct on the part of the plaintiff to this extent, that the fact of his bringing the action is oppressive, or that he has made an exorbitant claim by carelessness or recklessness, they would, in my mind, be such as would be a good cause for a judge interfering. So, if the finding of the jury is such that if the ordinary course of taxation were followed it would make the result unjust to either of the parties, then I think that injustice itself would be a just cause which would enable the judge to make an order as to costs."

In dealing with the facts of the case before him, which was an action of ejectment, in which the plaintiff recovered a portion only of the property, the Master of the Rolls stated that "if by ordinary examination of the title-deeds or plans, or the ordinary examination of witnesses, he could have seen that he had no claim in respect of half the property which he claimed, I should think that would have made it oppressive in him and wrong to have brought this action for all the land he claimed." In the same case, Bowen, L.J., said (at p. 272): "'Good cause' really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make. Now, to ascertain the existence of such facts, the judge should look, in the first place, at the

(1) 13 Q. B. D. 262 (C.A.).

result of the action itself, namely, the verdict of the jury, and he should look also at the conduct of the parties, to see whether either of them had in any way involved the other unnecessarily in the expense of litigation; and beyond that he should consider all the facts of the case, so far as no particular fact was concluded by the verdict of the jury."

In *Huxley* v. *West London Extension Ry. Co.* (1), which was an action brought by the plaintiff against the defendants for negligence in carrying the plaintiff as a passenger over their railway, he claimed damages to the amount of 3000*l.* On the trial the jury awarded him 50*l.*, and Lord Coleridge, C.J., before whom the case was tried, deprived the plaintiff of costs, being of opinion that "he had preferred an extravagant and an extortionate claim, had supported it by fraudulent statements, and dishonest acts, and had endeavoured to substantiate it before the jury by evidence which they very properly disbelieved." The order of Lord Coleridge was affirmed by the Court of Appeal, and afterwards by the House of Lords. Lord Halsbury, in giving his judgment, speaking of the discretion as to costs vested in a judge, said: "Whatever may be involved in that discretion, I cannot entertain a doubt that everything which increases the litigation and the costs, and which places on the defendant a burden which he ought not to bear in the course of the litigation, is perfectly good cause for depriving the plaintiff of his costs." Lord Watson, without attempting to give a complete definition of the words "good cause," said: "They, at all events, embrace, in my opinion, everything for which the party is responsible connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense."

I do not think it necessary to cite further authority upon the general question, as to what constitutes "good cause" within the meaning of Order LXV. I must, however, point out one or two other matters which must be borne in mind in considering whether a judge has jurisdiction to exercise the discretion vested in him by that order. First, in determining whether good cause exists, the judge must accept the verdict as conclusive upon all matters of fact necessarily involved in it, however much he may

(1) 14 App. Cas. 26.

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personally dissent from the finding of the jury. So long, however, as the judge does not base his decision upon matter inconsistent with the verdict, all other matters outside the verdict are open for his consideration. Everything which led to the action, every circumstance tending to shew that the plaintiff was blameable in bringing it, everything reflecting upon the conduct of the parties in the course of the litigation itself (*Harnett* v. *Vise* (1), see per James, L.J. (pp. 310, 312)); and the judge is under no obligation to give effect to any special reasons or views the jury may have entertained or expressed in giving their verdict—such, for instance, as a hope or recommendation that it may or may not carry costs, unless such views accord with his own; nor is the amount of damages awarded to be taken as a conclusive test upon the question of "good cause," though it properly forms an element for consideration. For instance, the fact that a plaintiff has recovered a verdict to the full extent of his claim would primâ facie, entitle him to his costs; and yet there may be circumstances connected with the bringing of the action or in the conduct of it, which would make it to the last degree unjust that he should have them. So, on the other hand, should the jury, in an action for an assault or libel, award the plaintiff an ignominious compensation, it would not follow that as of course the judge ought to deprive him of his costs, although he might treat it as an indication of the opinion of the jury, in which he coincided, that the character of the plaintiff was worthless, and that the action never ought to have been brought, and was therefore oppressive.

Let me now consider separately the circumstances of the two cases before me.

That of *Roberts* v. *Jones* was an action brought by the plaintiff, a draper and undertaker at Birkenhead, to recover from the defendant, Captain Jones, who resided at Rhyl, in Flintshire, a sum of 640*l.* 14*s.* 9*d.*, for goods alleged to have been supplied to other persons on his orders. The defendant was a nephew and one of the executors of a Mrs. Jones, who died at Rhyl in June, 1887. The plaintiff was employed to conduct the funeral and to supply mourning to the servants of the deceased lady, and

(1) 5 Ex. D. 307 (C.A.)

also a suit of mourning for the defendant. These things were all paid for, and no question arose as to them. The defendant, however, also ordered the plaintiff to supply a suit of mourning to each of the several persons named in the printed particulars delivered in the action. These suits were supplied, and with them a number of other articles more particularly mentioned hereafter; and in respect of these suits and other articles the plaintiff brought his action and claimed a sum of 640*l.* 14*s.* 9½*d.* The defendant disputed his liability in respect of every portion of this demand, first, upon the ground that he had not in respect of any of them pledged his personal credit, or given any orders for them; and further, that as to the suits of mourning, they were supplied by the plaintiff under an arrangement made with the plaintiff that the defendant was not to be responsible unless he could as executor charge them against the estate of the deceased lady, which plaintiff assured him he could do. On the trial, the jury found that the defendant was personally liable in respect of the several suits of mourning—thus negativing the alleged arrangements, and in respect of these suits gave a verdict for the plaintiff for 200*l.*, and they handed me a memorandum shewing that in respect of each suit of mourning for the gentlemen, seven in number, they had allowed 7*l.* only, that being the amount charged for coat, vest, and trowsers; for each lady, five in number, 25*l.*; and for the children, three sums of 10*l.*, 10*l.*, and 6*l.*, making 26*l.* altogether. With regard to the rest of the claim, viz., 440*l* 14*s.* 9½*d.*, the jury found against it.

In considering the question before me, I have, of course, treated the verdict of the jury as conclusive of the defendant's liability for the amount of it; for although I cannot help feeling that in rendering himself to that extent personally liable, the defendant was under an erroneous impression, to which he had been mistakenly led in the course of a conversation with the plaintiff, the jury must be taken to have negatived any wilful misrepresentation of the plaintiff so far as these items were concerned. I do not, therefore, allow the erroneous impression of the defendant in the least to influence my judgment. The remainder of the claim, however, composed

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of numerous items, amounting, as I have already said, to no less a sum than 440*l.* 14*s.* 9½*d.*, was, in my opinion, utterly unjustifiable and absolutely without foundation. These items consisted of goods added to the various suits of mourning, and were such as no reasonable man of business could have supposed he was justified in treating as parts of the defendant's orders. Without referring to the minute details of the bill, it will be enough to point to the articles supplied to Mr. and Mrs. Wilde and children (254*l.* 14*s.* 4½*d.*), and the Rev. R. Thomas and Mrs. Thomas and children (222*l.* 7*s.*), together 477*l.* 1*s.* 4½*d.*, of which the jury disallowed 393*l.* 1*s.* 4½*d.*, the difference being part of the 200*l.* allowed as above-mentioned. I do not forget that both the plaintiff and his wife stated that express orders were given by the defendant that his sisters, Mrs. Wilde and Mrs. Thomas, were to have "anything they wished to order," or "what they liked to have"; but this was emphatically denied by the defendant. The verdict shews that the jury did not credit the statement, and in this view I unhesitatingly agree. I am satisfied that the plaintiff, in including such disallowed items in his bill, and in suing for and insisting upon his claim in respect of them down to the moment of the verdict, was endeavouring unjustly, oppressively, and unscrupulously to fix upon the defendant a liability for which he, or any reasonable person acquainted as he was with the facts, must have known there was no foundation. I have formed the same opinion with regard to each of the other items disallowed by the jury. Looking at the articles supplied to the gentlemen, could any undertaker of experience, unless under special orders, which the plaintiff had not, possibly suppose a simple suit of mourning comprised an overcoat, a hat, studs, braces, silk umbrella, ten handkerchiefs, and a necktie, such as supplied to Mr. E. H. Jones? I make no personal reflections upon those ladies to whom such disallowed articles were supplied, for neither Mrs. Thomas nor Mrs. Wilde were before me to offer their explanations. But the fact that on July 23, 1889, Mr. and Mrs. Thomas guaranteed to the plaintiff the payment of the disputed account, so far as it related to themselves, and their proportion of costs in the event of the plaintiff failing to recover it from the defendant,

is significant, and there was a similar guarantee on the part of Mr. and Mrs. Wilde. As to the articles supplied to the children, I say nothing, for "de minimis non curat lex."

It was argued by the plaintiff's counsel that the amounts found by the jury might have been paid into Court. This is true enough, and the effect of the defendant not paying anything into Court is that I cannot absolve him from payment of such costs in respect of that amount, as hereafter mentioned; but I thoroughly appreciate the difficulty the defendant laboured under in fixing upon any precise sum which he could reasonably hope or expect the plaintiff would have been likely to accept, seeing the numerous items improperly introduced into the claim which the plaintiff was insisting upon in its integrity. I think, under the circumstances to which I have referred, it would be unjust to the defendant were I not to exercise the discretionary power vested in me by Order LXV.

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An additional ground, however, has been pressed upon me for exercising that discretion with reference to that portion of the plaintiff's costs which were, in my opinion, wantonly, vexatiously, and unnecessarily increased by reason of the plaintiff's having oppressively abused the privilege conferred upon him by Order XXXVI., in selecting Middlesex as the place for the trial of the action. I do not mean to say that he actually in words nominated Middlesex, but in omitting to name any place of trial, he must be taken to have selected Middlesex, since by Order XXXVI., when no place for trial is named the place of trial shall be Middlesex. Not one of the witnesses called by the plaintiff (seven in number) resided in or near Middlesex. Six of them came from Flintshire or Cheshire, and one from Oswestry. The trial extended over two whole days and parts of two others. It is obvious that the expenses of bringing these witnesses to London and maintaining them there, greatly increased the costs. No reason of any sort was suggested by the plaintiff for not trying the action at Chester, in the county where he lived and carried on his business, or at Liverpool or in Flintshire. The defendant's counsel, however, with great reason, did suggest that it was not with a view to a fair trial that he selected Middlesex, but in the hope that a Middlesex

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jury would be more likely to be imposed on to find a verdict supporting his exorbitant claim, than a jury either of his own county or of Liverpool or Flintshire; and thus he endeavoured to gain an unfair advantage over the defendant, and to fix upon him an unjust claim. In my opinion, a most reckless and oppressive increase of costs was created, and with an unworthy motive, from which the defendant ought to be protected. I know it may be said that a plaintiff has a legal right to name the place of trial, subject to the order of a judge directing it to be elsewhere, and that the defendant might have made application to order a trial in Cheshire, which the defendant in this case did not do. I answer this by saying that the defendant was under no obligation to take such a step; that his not taking it cannot be taken as any assent to the plaintiff's selection of venue, and that it does not exonerate the plaintiff from the consequences of an oppressive abuse of his privilege occasioning wanton increase of costs. In conferring the privilege, it must have been assumed by those who framed the order that the plaintiff would use it fairly and in reason, and not capriciously for the purpose of vexatiously and unfairly prejudicing his opponent. I thoroughly agree that a reasonable use of the privilege, even though it may occasion a little more expense, ought not to be interfered with. But an unreasonable abuse of it, though it may be strictly legal, does not confer upon a plaintiff an indefeasible title to recover against the defendant recklessly unnecessary costs which, but for such abuse, would not have been occasioned. The legal right may exist, but the abuse of it must and ought to be at the peril of the person who so abuses it, and more particularly ought this to be so when the privilege is abused in order to gain an unfair and unjust advantage over the defendant. Suppose, acting on his privilege, a plaintiff who had sustained slight injury to the extent which justified him in suing in a Superior Court, say to the extent of 20*l.*, by negligent driving of the defendant's servant in Newcastle, were to bring an action and fix Cornwall as the place of trial, and at the trial in Cornwall the jury were to give the plaintiff a verdict even for the full amount claimed, would it be tolerated that the plaintiff should have all the additional costs

of bringing the solicitor and witnesses from one end of England to the other without any reason beyond the mere fact that it was his privilege to try the case in the place of his own selection? What better cause, I would ask, can a judge have for depriving a plaintiff of costs than the fact that such costs, though legally, were nevertheless wantonly and oppressively incurred with a view to obtain an unjust advantage over or unfairly to harass a defendant in his defence, or vexatiously to increase the costs of the litigation?

I cannot help thinking that Order LXV. was intended, among other things, to give the judge power to check such abuse. I am not without warrant and authority for saying that the fact that costs are legally incurred, by no means proves they are not oppressive and unjust. Legality and oppression are not unknown to run hand in hand. A man may legally sue in any Court he pleases, but the legislature has long since recognized the impropriety of a plaintiff suing in a Supreme Court in respect of a cause of action which, having regard to the damages or sum sought to be recovered, ought in reason to be brought in a less expensive one, viz., a county court, by depriving him of all costs unless the judge who tries the action otherwise directs, and by allowing in certain cases costs only on a lower scale if the action could have been brought in a county court. Thus a plaintiff imperils his costs if he abuses his privilege to sue unnecessarily in a Supreme Court. Why not also if he abuses his privilege in his selection of the place of trial? In *Collins* v. *Welch* (1), which was an action of tort for negligence occasioning personal injuries, the jury found for the plaintiff, damages 12*l.*, and that the claim was bonâ fide. Both the judge (Denman, J.) and the jury thought the action, though legally brought in a Superior Court, ought in reason to have been brought in the county court, and the judge treated that as good cause for wholly depriving the plaintiff of his costs. This Order was upheld by the Divisional Court, and also in the Court of Appeal. It is true the final decision turned upon another point, but the goodness of the cause was not even questioned. In *Jones* v. *Curling* (2), this case was referred to by Brett, M.R., without

(1) 5 C. P. D. 27 (C.A.). (2) 13 Q. B. D. 262.

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questioning its correctness. Cases are also to be found in which the plaintiff has been exercising his legal right to sue and has recovered—he has not only been deprived of costs, but also ordered to pay the costs of the defendant, although the defendant by the verdict was shewn to be legally wrong. See *Williams* v. *Ward*, (1) also *Harris* v. *Petherick*, (2) where the claim being for 85*l.* 6*s.*, the plaintiff recovered 6*s.* only. He was ordered to pay the costs of the trial. See also *Barnes* v. *Maltby* (3) where in an action for defamation the plaintiff was deprived of his costs, even though he recovered 5*l.* beyond a sum of 10*l.* which the defendant had paid into court. Those cases shew that a plaintiff, though he may have simply pursued his legal right to sue, may nevertheless be not only deprived of his own costs, but ordered to pay the costs of the defendant who was legally wrong, if the plaintiff's conduct before or in the course of the litigation has been vexatious and oppressive.

It was, however, said in *Roberts* v. *Jones* that the defendant must be taken to have assented to the venue selected by the plaintiff, because he made no application to a judge to change it, as he might have done under Order XXXVI., r. 1. I do not assent to this view. The defendant was simply passive in the matter. A defendant seeing a selection of venue made by the plaintiff, may well feel that it will involve unnecessary expenses, and yet not think it expedient to incur the costs of an interlocutory application to a master at chambers, subject to possible future appeal with uncertain results to a judge, a Divisional Court, the Court of Appeal, and the House of Lords, to remove it to the place where the cause of action arose. But he does not thereby assent to the plaintiff's selection. He may not unreasonably be moved to take no step by some such considerations as these: "The plaintiff has chosen to name London as the place of trial; I feel that is, and will ultimately be shewn to be, an abuse of his privilege, and is calculated to cause vexatious increase of costs. Still the result of an interlocutory application, made and resisted on affidavits pretty certain to be conflicting at a time when the true state of things is almost impossible to

(1) 55 L. J. (Q.B.) 566 (C.A.). (2) 4 Q. B. D. 611 (C.A.).
(3) 5 Times L. R. 207.

be accurately ascertained, is always uncertain. I prefer, therefore, to wait until the trial, when the case will be fully heard by the judge and jury, and then if good cause appears, I will appeal to the judge to protect me against the costs which have been vexatiously incurred, and which I may have to pay unless I am protected by him." Why, I ask, should not a plaintiff exercising his privilege do so at his peril if he abuses it, without calling on the defendant to take steps to check his misconduct? Even when an unsuccessful application is made by a defendant (as was the case in *Willey* v. *Great Northern Ry. Co.*) to change the venue, the refusal of the Court or judge to make an order ought, in my opinion, by no means to be taken as a conclusive judgment that the plaintiff has not been guilty of an abuse of his privilege. It is indeed conclusive that no sufficient reason was shewn on the affidavits then before them. But it is not conclusive to prove that the plaintiff's selection of venue was not dictated by such unworthy and unjustifiable motives as to amount to gross abuse of his legal right. For the Court or judge refusing to make an order to change the venue, cannot have before them all the circumstances. They cannot try the action. They can only deal with the necessarily imperfect materials before them. The defendant in cases such as these, when fraud is substantially imputed, rarely knows the full character of the plaintiff's case or of the evidence he intends to adduce to support it, and the plaintiff is not likely, if he can avoid doing so, to assist him. All, therefore, the Court or judge can say is: "At the present moment we are not satisfied that we ought to deprive the plaintiff of his privilege. We therefore do not interfere with his exercise of it." But this does not operate as an injunction upon the judge who tries the case not to exercise his discretion under Order LXV., r. 1, when the whole of the facts have been disclosed to him on the trial. Of course, he would give careful consideration to the views of the Court or judge upon the case as, and at the time, it was presented to them; but by these views he would not be bound if, with the whole circumstances before him, and which were not before them, he took a different view.

In the case of *Roberts* v. *Jones*, having come to the conclusion

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that, for the reasons above-mentioned, I have jurisdiction, and that I ought to exercise my discretion as to costs, I order that the plaintiff, who has succeeded only to an extent not amounting to quite one-third of his claim, shall be allowed, as against the defendant, one-third of his costs of the action and no more; that such costs shall be taxed as if the action had been tried at Chester, and that the defendant, having succeeded to an extent exceeding two-thirds of the claim made against him, shall be allowed, as against the plaintiff, two-thirds of his costs of the defence to this action, and that such last-mentioned costs shall be taxed treating the action as having been tried as it actually was tried, that is, in Middlesex: see per Jessel, M.R., in *Willmott* v. *Barber*. (1)

In the case of *Willey* v. *Great Northern Railway Co.*, the plaintiff was a worsted spinner carrying on business at Halifax. He complained that while he was a passenger in a train of the defendants near Halifax on October 12, 1889, through the negligence of the defendants' servants a collision occurred, causing him personal injury and great loss of trade. In his statement of claim he claimed 10,000*l.*, and named Middlesex as the place of trial. Particulars of the expenses incurred by the plaintiff in respect of his personal injuries and of his trade losses were delivered on July 5, 1890, and in them 262*l.* 14*s.* was claimed as the amount of such expenses, and 6388*l.* 7*s.* as the trade loss. The items of such claim I need not read, but they are before me. In October in the same year application was made to change the venue to Leeds, but such application was refused by a Divisional Court on grounds stated in the affidavits. The defendants paid 1*s.* into court, and the only issue which was one as to damages, was tried in Middlesex before me by a special jury, who after a trial extending over parts of three days gave a verdict for the plaintiff with 800*l.* damages, including both heads of damage. They were not asked to separate the amounts. As regards the extent of the personal injuries, there was practically no dispute, the medical men were agreed as to them, and I saw no reason for imputing to the plaintiff that he had unfairly exaggerated them. As to the trade claim, however, amounting to 6126*l.* 7*s.*, I cannot speak in

(1) 17 Ch. D. 772.

the same terms. The jury have treated it as grossly exorbitant, and I think they were fully justified in doing so. It was denounced as a sham claim, dishonestly put forward, and I can find no fault with the learned counsel for the defendant for so presenting it to the consideration of the jury. I could not, without travelling at too much length into its nature and history, discuss it in detail, but I arrived at the conclusion that it was utterly and unscrupulously unjust, and not merely a bonâ fide claim of an exaggerated amount. Moreover, as I and the jury were invited to do, I thought that the place of trial, namely, Middlesex, was selected by the plaintiff, not for the purpose of saving the expense of taking medical witnesses from London to Leeds, or for any other of the reasons suggested, but mainly with the sinister object of getting the trade claim tried by a jury not conversant with the trade carried on by the plaintiff, in the hope that they might be persuaded to sanction a claim which he had recklessly though carefully and intentionally made, and which he must or ought to have known to be unjust. Mr. Bond was the only witness called to speak to personal injuries who resided in London, and it was said it would have been expensive to take him to Leeds. Grave doubts might have been raised whether it would have been necessary to do so, seeing that all the medical witnesses on both sides were substantially in agreement. All the rest of the witnesses called for the plaintiff, nine in number, including two doctors, resided in Halifax, Leeds, or the neighbourhood, to say nothing of the witnesses in attendance for the defendant. No one can doubt that this caused great and unnecessary addition to the costs of the trial, and I feel sure that, had all the facts before me been presented to the learned judges who refused to change the venue as they were to me, their judgment would have been other than it was. In this case I come to the conclusion that selecting Middlesex as the venue was a wanton and unjustifiable abuse of the privilege conferred by Order XXXVI. For the reasons I have shortly expressed, I feel that I have good cause for exercising my discretion over the costs, and I exercise that discretion thus: I order that the plaintiff shall have his costs of action so far as they are strictly confined to his claim for personal injuries and suffering, and no

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more, and that such costs shall be taxed as if the trial had taken place in Leeds, and I further order that the plaintiff do pay to the defendants all their, the defendants', costs so far as they relate to the trade claim, such costs to be taxed treating the action as tried in Middlesex, as in fact it was tried; and I further order that the plaintiff do pay to the defendants the difference in the expenses of procuring the attendance of any medical witness occasioned by trying in London instead of at Leeds.

Orders accordingly.

Solicitor for the plaintiff in *Roberts* v. *Jones*: *Clulow & Gould.*

Solicitors for the defendant in *Roberts* v. *Jones*: *Field, Roscoe, & Co., for Sisson & George, Rhyl.*

Solicitors for the plaintiff in *Willey* v. *Great Northern Railway Co.*: *Burn & Berridge, for Watson, Son, & Smith, Bradford.*

Solicitors for the defendants in *Willey* v. *Great Northern Railway Co.*: *Nelson, Barr, & Nelson.*

H. D. W.

April 24.

FRANCE *v.* DUTTON.

County Court—Practice—Costs—Particulars, Cost of—Signature of Solicitor—Subscription by Clerk—County Court Rules, 1889, *Order* XXVII., *r.* 4, *App.—Scale of Costs.*

By the County Court Rules, 1889, App. Scale of costs, certain sums may be allowed to a solicitor for preparing particulars of claim and copies thereof, "provided that such particulars and copies are signed by the solicitor." Particulars were signed in the name of the solicitor by his clerk, in pursuance of a general authority for this purpose:—

Held (distinguishing *Reg.* v. *Cowper* (24 Q. B. D. 60; 533)), that the signature was sufficient.

APPEAL from Clerkenwell County Court.

The appellant, a claimant in an interpleader issue, had recovered judgment with costs. His solicitor's bill of costs was carried in for taxation, but objection was made to an item for "particulars" upon the ground that the particulars were not signed by the solicitor. They were, in fact, signed in his name by his duly authorized clerk, in pursuance of a general authority for this

purpose. The objection was allowed. The decision of the registrar was affirmed by the judge, who, however, gave leave to appeal.

Whateley, for the appellant. This case is not governed by *Reg.* v. *Cowper* (1), in which this Court held that in order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and that a lithographed statement of the solicitor's name on the particulars was insufficient; and in the Court of Appeal, Fry, L.J., was of that opinion, Lord Esher, M.R., dissenting. That case was under Order VI., r. 4, of the County Court Rules, 1889, which directs that the solicitor "shall indorse on the particulars his name"; and as Fry, L.J., said: "A mere lithographed form, the blanks in which may be filled up at any time, offers no guarantee that it has come under the personal cognizance of the solicitor, or any person authorized to act on his behalf." The particulars in the present case were given under Order XXVII., r. 4, which requires the claimant to deliver particulars, but not that they shall be signed by a solicitor. By the scale of costs, higher scale, certain sums may be allowed for:—"1. Preparing particulars of claim, including necessary copies thereof, where the claim is a liquidated demand; provided that such particulars and copies are signed by the solicitor. 2. The like in all other claims." This claim is one of such "other claims"; and, therefore, par. 2, which has no proviso as to signature by a solicitor, applies. Secondly, even if the particulars should be "signed by a solicitor," in order that the costs may be allowed, these particulars were so signed. In *Ex parte Hirst, In re Hirst* (2), it was held, on the Bankruptcy Rules, 1870, that a notice summoning a first general meeting of creditors was sufficient, although the name of the debtor's attorney was subscribed by his clerk by his direction. In *Reg.* v. *Justices of Kent* (3), notice of appeal, which by 12 & 13 Vict. c. 45, s. 1, "shall be in writing, signed by the person . . . giving the same, or by his . . . attorney on his . . . behalf," was signed

(1) 24 Q. B. D. 60; 533. (2) Law Rep. 18 Eq. 704.
(3) Law Rep. 8 Q. B. 305.

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in the name of the appellant by his authority by the clerk to his attorney, but was held sufficient.

Jelf, Q.C. (*Muir Mackenzie*, with him), for the defendant. Although there is a slight difference in fact, there is none in principle, between this case and *Reg.* v. *Cowper.* (1) In that case the issue of the form with the solicitor's name lithographed on it was authorized, yet the Court held that the particulars were not signed by him. The object of the rules is to ensure the attention of the solicitor to the particulars, by making his right to the costs of them depend upon his signing them. His personal signature is, therefore, required. Of course, in case of physical incapacity to sign, he might expressly authorize another person to use the pen for him, and put his name to the particular document. But his mind must be applied to it when filled up. That is the ratio decidendi of *Reg.* v. *Cowper* (1). A mere general implied authority to sign is insufficient.

LORD COLERIDGE, C.J. I am of opinion that this case is not within the authority of *Reg.* v. *Cowper.* (1) We have to consider whether a solicitor is entitled to charge and be paid for certain particulars which were not signed by his own hand, but were signed by his clerk, who is admitted to have had general authority to do this act. The question is whether any words in the Act of Parliament make it necessary that this particular act should be done by the individual person who is represented on the face of the document to have done it. I agree with the decision of the Queen's Bench in *Reg.* v. *Justices of Kent* (2), in which Blackburn, J., explained that at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature. It is admitted that these particulars are so drawn as to be binding on the solicitor and on his client. The question is whether they are signed by the solicitor so as to be within the County Court Rule, and the subject of allowance in the bill of costs. By County Court Rules, 1889, Order VI., r. 10, "The solicitor of a plaintiff, suing by a solicitor, shall endorse on

(1) 24 Q. B. D. 60; 533. (2) Law Rep. 8 Q. B. 305.

the particulars his name," &c. We held in *Reg.* v. *Cowper* (1) that the word "indorse" in that rule meant "sign," because in the appendix the word "signed" is used, and it was important to shew and ascertain that the document, which had an important bearing on the litigation, had actually come under the personal notice of the solicitor and had been adopted by him. In that case the signature was lithographed. There could be no doubt that it issued from the solicitor's office, and that it represented, in a sense, the mind of the solicitor, because he adopted it, and charged fees for it. The question was whether the rule had been complied with, and the particulars had been "signed" by the solicitor; and we held that a lithographed signature put to a form by a lithographer was not a signature by the solicitor. In the present case the state of things is different. The document, which purports to be signed by the solicitor, was, in fact, signed by his clerk, who had authority to conduct business, and really conducted it for his master, and signed in the name of his master. Does this come within the principle, "Qui facit per alium facit per se"? If so, it is within *Reg.* v. *Justices of Kent* (2), and is a good signature. I think that it does. It was ascertained that the master empowered his clerk to do this particular act, and the act was done by the clerk within the scope of his authority; one part of the authority being to sign his master's name to these particulars. These two facts distinguish the case from *Reg.* v. *Cowper* (1). This case is within *Reg.* v. *Justices of Kent* (2) and not *Reg.* v. *Cowper.* (1) The distinction seems to me to be clear.

MATHEW, J. I am of the same opinion. The document on the face of it purported to be prepared pro hâc vice, to have come before the solicitor, and to be signed by him. Was it signed by the solicitor? It is said that it was, because it was signed by his agent, properly authorized for that purpose. It seems to me that those who made the rules never meant that in cases like the present the particulars should be signed by the solicitor himself. The distinction between this case and *Reg.* v. *Cowper* (1) is obvious. It was impossible in that case to say that the

(1) 24 Q. B. D. 60; 533. (2) Law Rep. 8 Q. B. 305.

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lithographed form was signed by a solicitor. It was one of a large number of forms, prepared beforehand, with the name of the solicitor lithographed on it. There was nothing to shew that it was prepared or signed for the particular case. The distinction is sufficient to justify us in saying that, on the information which the taxing master had as to the particulars, the costs should have been allowed.

Appeal allowed.

Solicitor for appellant: *Geo. Castle.*

Solicitors for respondent: *Cooper & Bate.*

J. R.

April 22.

THE QUEEN *v.* THE LOCAL BOARD OF GOOLE.

Local Government—"Streets"—"Passages"—Local Authority—Bye-laws, Power to make—Bye-law prescribing Width of New Streets—Validity—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 4, *s.* 157, *sub-s.* 1.

An urban authority made a bye-law under the Public Health Act, 1875, directing that all new streets should be of a width of not less than ten feet. Certain ways existed communicating with the backs of the houses, and used by the urban authority, who did the scavenging of the town, for the purpose of obtaining access to privies and ashpits in order to remove the contents thereof. Plans were submitted for approval to the urban authority shewing ways such as above described of the width of six feet, and the urban authority, who had published a bye-law under the Public Health Act, 1875, prescribing ten feet as the minimum width of new streets, refused to approve such plans:—

Held, discharging a rule for a mandamus to compel the approval of the plans, that the ways in question were "passages" within the meaning of s. 4 of the Public Health Act, 1875, and therefore were "streets" within the meaning of that section, and therefore the urban authority had power by s. 157, sub-s. 1, to make bye-laws with respect to their width and construction, and the bye-law was valid.

ARGUMENT of a rule nisi for a mandamus directed to the defendants, the urban authority of Goole, commanding them to approve certain plans which had been submitted to them. In the town of Goole, in which the defendants, as the urban authority, did the scavenging, by removing in carts the contents of privies and ashpits at the backs of the houses, certain ways existed, leading to the backs of the houses, and used for the purpose of obtaining access to the privies and ashpits in order to

remove the contents. Some of the ways already existing were only four feet in width. The plans in question were submitted to the defendants, as the urban authority, for approval, and showed certain proposed new ways of the width of six feet. The defendants had made and published a bye-law under the Public Health Act, 1875, which required that all new streets should be constructed of a width of not less than ten feet. They accordingly declined to approve the plans submitted to them, requiring that all new streets should be constructed in accordance with their bye-law.

E. Tindal Atkinson, Q.C., and *Hohler*, for the Local Board, shewed cause. There is no ground for this application. The places in question are clearly "passages," and if so it follows that they are "streets," for by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, "'street' includes any . . . . passage whether a thoroughfare or not." It is a question of fact whether a particular place is a "street" or not, and the facts here bring these places within the definition clause. *Taylor* v. *Corporation of Oldham* (1). If they are streets the Local Board, who are the urban authority for the town of Goole, are authorized by s. 157, sub-s. 1, of the Public Health Act, 1875, to make bye-laws with respect to their width and construction.

C. Montague Lush, in support of the rule. The bye-law is ultra vires and invalid. These places are private occupation ways, and are in no sense streets within the meaning of the Public Health Act. There is nothing to shew that the public have any right of passage over them, and the Local Board can have no power to make bye-laws regulating their width. *Le Neve* v. *Vestry of Mile End Old Town* (2); *Waite* v. *Garston Local Board of Health* (3); *Curtis* v. *Embery* (4); *Metropolitan Board of Works* v. *Nathan* (5).

DAY, J. I am of opinion that the bye-law in question is valid. It has been sanctioned by the Local Government Board, and was made in pursuance of the Public Health Act, 1875 (38 & 39

(1) 4 Ch. D. 395.
(2) 8 E. & B. 1054; 27 L. J. (Q.B.) 208.
(3) Law Rep. 3 Q. B. 5.
(4) Law Rep. 7 Ex. 369.
(5) 54 L. T. (N.S.) 423.

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Vict. c. 55). The power to make bye-laws is given by s. 157 of that Act, which provides that "Every urban authority may make bye-laws with respect to the following matters: (that is to say) (1) With respect to the level, width and construction of new streets, and the provisions for the sewerage thereof." Then "street" is defined by s. 4 as follows: "'street' includes any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." Substantially the same provisions were contained in the old Acts. The local boards are the guardians for the public of the public interest. It is necessary that some public authority should exist for the purpose of carrying out the provisions of the Public Health Acts. I can see no reason why, in construing those Acts, we should deal with any question of consequences. On the contrary, we must construe the statutes fairly and justly. The plans which were submitted to the Local Board shewed "streets" and "passages," which it is now contended are not "passages." The Local Board took exception to the passages, because they were streets and were not of the right width. They were intended to be used primarily for the purpose of access to middens at the backs of the houses, to which were attached privies and ashpits. The Local Board do the scavenging of the town by clearing out these privies and ashpits, and carrying away the contents in carts. Formerly these passages were very narrow and inconvenient, for it appears that the Goole Local Board have for a long time submitted to passages only four feet wide. Now they insist on a width of ten feet, and the bye-law in question provides that no future passages are to be of a less width than ten feet. The Local Board have to exercise a discretion, and they are content with ten feet as the minimum width of the passages. I am clearly of opinion that the places shewn on the plans are "passages" within the meaning of s. 4 of the Public Health Act, 1875, and if that is so it follows that they are "streets" within the meaning of the Act, and are subject to the jurisdiction of the Local Board. It is contended that the point is decided adversely to the contention of the Local Board by *Waite* v. *Garston Local Board of*

Health. (1) I have looked carefully into that case, and if it were in point I should not hesitate to follow it. The decision there, however, turned on a different bye-law, for the case was decided on a bye-law made "with respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools, in connection with buildings," a provision corresponding to s. 157, sub-s. 4, of the Public Health Act, 1875, whereas the bye-law now before us has no relation to ashpits, &c., but is made under sub-s. 1, which has reference to streets. That case, therefore, turned on a different point, and no reference was made there to bye-laws made under any provision corresponding to sub-s. 1 in the Act now in force. It is contended that no bye-law can be made with reference to a street unless it is a public street, but by the express provisions of s. 4 a "passage" is a "street;" and the places here in question are passages which communicate with the public streets, and there is nothing to shew that the public cannot pass along them. No gates are shewn on the plans, and it appears to me that the public can and will pass. These passages may become very inconvenient if they are allowed to be made of an insufficient width. They are not private ways in any true sense of the term. I concur in the view expressed by Jessel, M.R., as to the meaning of the word "street" in *Taylor* v. *Corporation of Oldham.* (2) The places here in question are places over which the public may acquire a right of passage.

For these reasons I am of opinion that the rule for a mandamus ought to be discharged.

LAWRANCE, J. I am of the same opinion. I think the Local Board are acting within their rights in making a bye-law providing that the streets shall be of sufficient width. It is not necessary to decide whether the streets will be public or private streets, for in any case the Local Board have power to have them lighted and paved.

Rule discharged.

Solicitors for the prosecution: *Bell, Bradrick, & Gray, for J. T. & H. Woodhouse, Hull.*

Solicitors for the Local Board: *Williamson, Hill, & Co.*

(1) Law Rep. 3 Q. B. 5. (2) 4 Ch. D. at pp. 407, 408, 409.

P. B. H.

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June 1, 19.

FENWICK, APPELLANT; THE RURAL SANITARY AUTHORITY OF THE CROYDON UNION, RESPONDENTS.

Local Government—Streets—Recovery of Expenses—Public Highway—Sewering, Paving, &c.—Liability of Frontager—Order of Local Government Board declaring Road to be a Street—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 276.

The appellant was summoned under s. 150 of the Public Health Act, 1875, for nonpayment of expenses incurred by the rural authority in sewering, paving, &c., a road on which his premises abutted. An order of the Local Government Board, under s. 276, had declared s. 150 to be in force as to the road in question, which the order also declared to be a street. The road ran from a turnpike road to a bridge, where it passed into another parish, and was from that point repaired by the local board of that parish as a highway. It was about 900 feet long. It had on the south side several houses, including the appellant's house, abutting on it; on the north there were none for 785 feet from the turnpike road. For the rest of its course it was bounded on that side by a sewage farm belonging to the rural authority, on which were two buildings. It was a public highway. There was no evidence of formal dedication of the road, but there was evidence of its use as a public highway since 1835, and some evidence before 1835, but none inconsistent with its having been then an occupation road or footpath.

The justices held the order of the Local Government Board conclusive, that the road was a street, and further held, that, although in their opinion it was not a street in the popular acceptation of the word, it was a street within the meaning of s. 4 of the Public Health Act, 1875.

On a case stated:—

Held, that the justices were wrong in holding that the order of the Local Government Board was conclusive that the road was a street, but that by the definition in s. 4 it was a "street" within the meaning of s. 150, and the appellant was liable.

Judgments of the Court of Appeal in *Corporation of Portsmouth* v. *Smith* (13 Q. B. D. 184), and in *Jowett* v. *Local Board of Idle* (W. N. (1888), p. 87) followed.

Reg. v. *Burnup* (50 J. P. 598) not followed.

CASE stated by justices.

At a petty sessions holden at Croydon a complaint preferred by the Rural Sanitary Authority of the Croydon Union (the respondents), against Robert Bloomfield Fenwick (the appellant), under the Public Health Act, 1875, whereby the respondents sought to recover from the appellant two sums of 48*l.* 10*s.* 10*d.* and 34*l.* 11*s.* 8*d.* respectively, being the proportions of a certain expense of 551*l.* 2*s.* 4*d.* incurred by the respondents in the sewering,

levelling, paving, metalling, channelling, and making good of Byegrove Road, within the district of the respondents, settled by the surveyor to the respondents as being payable by the appellant as the owner of two lots of premises fronting, adjoining, or abutting upon Byegrove Road, was heard and determined, and upon such hearing the justices ordered that the appellant do pay to the respondents the said sums of 48*l.* 10*s.* 10*d.* and 34*l.* 11*s.* 8*d.* and 50*l.* 15*s.* 1*d.*, for costs, and stated the following case:—

Upon the hearing it was admitted or proved that the appellant was the owner of the premises, that the same abutted upon Byegrove Road, and that an order of the Local Government Board, dated June 4, 1886, had been obtained under s. 276 of the Public Health Act, 1875, declaring the provisions of s. 150 to be in force within the district of the respondents as to certain places therein called and purported to be declared "streets," including by name Byegrove Road. Such order was made after the due formalities had been complied with;

It was also proved or admitted that all other the notices and plans, sections, estimates, and apportionments by s. 150 required had been duly made, served, and deposited respectively, that the appellant had not complied with the notice to do the work, that the work had been executed by the respondents at the said expense, and that the amounts sought to be recovered had been properly apportioned against the appellant according to the frontages of his premises;

Byegrove Road runs from the London and Merton turnpike road to a bridge over the River Wandle, where the road passes into the parish of Wimbledon, from which point it is repaired by the Wimbledon Local Board as a highway repairable by the inhabitants at large. The length of Byegrove Road from the turnpike road to the bridge is about 900 feet;

Byegrove Road is bounded on the south side for the first 264 feet by land containing three detached buildings, then by the opening into a road called Bailey Road, only accessible from Byegrove Road, which contains seventeen cottages, eight on one side and nine on the other, then for the next 65 feet by land containing one building, then for the next 151 feet by land

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containing a row of eleven cottages, and for the remainder of its course, being a distance of 399 feet, by the gardens and pleasure grounds of the appellant, forming together the two lots of premises in respect of the frontage of which the said sums were sought to be recovered;

Byegrove Road is bounded on its north side for 785 feet from the turnpike road, by land containing no buildings other than the private house fronting the turnpike road, and for the rest of its course, a distance of 235 feet, by a sewage farm of the respondents upon which there are two buildings.

Byegrove Road is a public highway. It was not alleged that there had been, and there was no evidence of, any formal dedication thereof, but there was evidence of its user as a public highway during a period since the year 1835. There was some evidence of user of it earlier than the year 1835, but none inconsistent with its having been then a mere occupation road, or, if public, a mere footpath. It was not proved affirmatively by the respondents that Byegrove Road had been dedicated to the public since the year 1835;

No certificate enrolled at quarter sessions under s. 23 of the Highway Act, 1835, was produced in evidence;

In the year 1880 the respondents laid out the sewage farm hereinbefore mentioned, and for the protection of the same from floods covered in a ditch which used to run along that part of the south side of Byegrove Road, where the buildings and cottages before mentioned now adjoin the road, and which was a source of danger to persons using the road, and for their own and the public convenience threw such ditch when so covered in into the roadway;

At some time since the laying out of the sewage farm, but before the date of the order of the Local Government Board, the respondents placed some metal or gravel upon the roadway of Byegrove Road, to repair the damage done to the same by traffic to the sewage farm;

In the year 1889 the respondents, for their own and the public convenience, widened Byegrove Road by acquiring from the owners and throwing into the roadway a strip of land about 600 feet in length and of varying width, but at no point more

than ten feet wide, on the opposite side of Byegrove Road to the premises of the appellant.

The respondents contended:—

That the order of the Local Government Board precluded the appellant from denying Byegrove Road to be a "street" within the meaning of s. 150 of the Public Health Act, 1875;

That the question whether Byegrove Road was a "street" within the meaning of s. 150 did not arise, inasmuch as the respondents had acted under powers so conferred by the order, which applied the provisions of s. 150 to the piece of land known as Byegrove Road specifically;

That Byegrove Road was a "street" according to the common use and simple ordinary meaning of that word;

That Byegrove Road was by virtue of the definition in s. 4 of the Public Health Act, 1875, a "street" within the meaning of s. 150 of the same Act.

The appellant contended:—

That the order of the Local Government Board was irrelevant to the question whether Byegrove Road was a "street" within s. 150;

That Byegrove Road was not a street either according to the common use and simple ordinary meaning of that word or within the purview of s. 150;

That Byegrove Road being a public highway the presumption arose, which it was for the respondents to rebut by evidence, that it was a highway repairable by the inhabitants at large;

That the appellant was not liable under s. 150 for expenses incurred in making good to the satisfaction of the respondents Byegrove Road, as widened and altered by the respondents.

The justices held that the order of the Local Government Board was binding and conclusive with respect to the application of s. 150 of the Public Health Act, 1875, to Byegrove Road in such a sense as to preclude the appellant from raising the defence that it was not a street within s. 150.

But apart from that order they found:—

That Byegrove Road was not a highway before the passing of the Highway Act, 1835, but that it had since become a highway, and was one when dealt with by the respondents, but not a highway repairable by the inhabitants at large;

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That Byegrove Road was in no wise a street according to the common use and simple ordinary meaning of that word;

That the only ground for calling Byegrove Road a street was the occurrence of the word "highway" in the definition of street contained in s. 4 of the Public Health Act, 1875.

First, therefore, by virtue of the definition, and secondly, by virtue of the order of the Local Government Board, they held the appellant liable to pay the amounts claimed.

The questions for the opinion of the Court were:—

Whether the order of the Local Government Board precluded the appellant from raising the question whether Byegrove Road was a street within the meaning of s. 150, inasmuch as the respondents had acted under powers so conferred by the order, which applied the provisions of s. 150 to the piece of land known as Byegrove Road specifically;

Whether the question as to whether Byegrove Road was a "street" within the meaning of s. 150 arose under the circumstances of the case;

Whether upon the facts they were warranted in law in finding Byegrove Road to be a highway not repairable by the inhabitants at large;

Whether upon the facts and findings they were right in finding Byegrove Road to be a street within the meaning of s. 150 of the Public Health Act, 1875;

Whether the facts precluded the respondents from recovering from the appellant the expense of making good Byegrove Road.

If upon the answers to the above questions the appellant was not liable to pay the amounts claimed, then the order of the justices was to be quashed, otherwise to stand.

June 1. *Dodd, Q.C.* (*Rowlatt*, with him), for the appellant. The justices were wrong in holding that the order of the Local Government Board was conclusive of the question whether Byegrove Road was a street or not. Their findings, independently of that order, shew that it was not a street, either in the common acceptation of the term, or within the meaning of the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 150, and

the appellant is therefore not liable. He referred to *Robinson* v. *Local Board of Barton Eccles* (1); *Mayor, &c., of Portsmouth* v. *Smith* (2); *Jowett* v. *Local Board of Idle* (3); *Richards* v. *Kessick.* (4)

R. G. Glenn, for the respondents. The justices were right on all their grounds. What they have really held is that, if s. 150 stood alone, Byegrove Road would not be a street, but that when the definition of "street" contained in s. 4 is read with s. 150, the two together shew that it is a street within the meaning of the Act. As long as the order of the Local Government Board remains in force it is impossible to hold that it is not a street. He referred to *Taylor* v. *Corporation of Oldham* (5); *Mason* v. *Wirral Highway Board* (6); *Maude* v. *Baildon Local Board* (7); *Ex parte Wake.* (8)

Dodd, Q.C., replied.

Cur. adv. vult.

June 17. The judgment of the Court (Cave and Charles, JJ.) was read by

CHARLES, J. In this case the respondents are the Rural Sanitary Authority of the Croydon Union. The appellant is owner of premises abutting on a road called Byegrove Road, in Mitcham, a contributory place within the respondents' district. On June 4, 1886, an order of the Local Government Board was obtained, under s. 276 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), declaring the provisions of s. 150 of the Act to be in force within the respondents' district, "so far as regards the following streets—namely, within the contributory district of Mitcham: Byegrove Road." The order further invested the guardians of the poor of the union, as such sanitary authority, "with all the powers, rights, duties, capacities, liabilities, and obligations of an urban sanitary authority," within

(1) 21 Ch. D. 621; 8 App. Cas. 798.

(2) 13 Q. B. D. 184; 10 App. Cas. 364.

(3) W. N. (1888) 87; 36 W. R. 138, 530.

(4) 57 L. J. (M.C.) 48; 59 L. T. (N.S.) 318.

(5) 4 Ch. D. 395.

(6) 4 Q. B. D. 459.

(7) 10 Q. B. D. 394.

(8) 11 Q. B. D. 291; affirmed sub nom.: *Wake* v. *Mayor, &c., of Sheffield* (12 Q. B. D. 142).

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the contributory place of Mitcham, so far as regards (among other streets) the aforesaid street. All necessary notices, &c., to pave the street opposite to his premises were given to the appellant under s. 150 of the Act, but he did not comply with them, and the paving work mentioned in them was thereupon executed by the respondents, at an expense which they claimed to be entitled to recover from the appellant. He denied his liability, and proceedings were then taken against him before the justices of Surrey, who decided that he was liable, subject to a case. The facts as to the alleged "street" were as follows: Byegrove Road runs from the London and Merton turnpike road to a bridge over the river Wandle, where it passes into the parish of Wimbledon, and is from that point repaired by the Wimbledon Local Board as a highway. It is about 900 feet long. It has on the south side several houses, including the appellant's house, abutting on it; on the north there are none for 785 feet from the turnpike road. For the rest of its course it is bounded on that side by a sewage farm of the respondents, on which are two buildings. It is a public highway. It was not alleged that there had been, and there was no evidence of, any formal dedication thereof, but there was evidence of its user as a public highway during the period since the year 1835. There was some evidence of user of it earlier than 1835, but none inconsistent with its having been then a mere occupation road, or if public, a mere footpath. It was not proved affirmatively that Byegrove Road had been dedicated to the public since 1835.

On these facts the magistrates held that the order of June, 1886, describing the road as a street, was conclusive, and precluded the appellant from saying that it was not; and although, in their opinion, the road was not a street in the popular acceptation of the word, they further held that it was a "street" by virtue of the definition in s. 4 of the Act of 1875. We have now to decide whether they were right in their decision upon these points.

With regard to the first question, we think the magistrates were mistaken in holding that the order of the Local Government Board was conclusive with reference to the application of

s. 150 of the Public Health Act, 1875, to Byegrove Road. Sect. 295 enacts that "all orders made by the Local Government Board, in pursuance of this Act, shall be binding and conclusive in respect of the matters to which they refer." Now, the order was made under the provisions of s. 276, and the matter to which it refers is—1st, the application of s. 150 (among other sections) of the Act to a large number of so-called streets within the respondents' district, including amongst them Byegrove Road; and, 2nd, the investing of the rural authority with all the powers of an urban authority, so far as regards the places mentioned. But we are of opinion that the purview of this order is simply to confer on the respondents, a rural authority, the same powers with regard to actual streets within their district that an urban authority would possess. If Byegrove Road be a street the rural authority can now deal with it under s. 150, but the mere description of it as a street in the order cannot make it one if it be not one in fact.

The next question is whether Byegrove Road is a street within the meaning of s. 150. The magistrates have found as a matter of fact that "it was in no wise a street according to the common use and simple ordinary meaning of that word." We are, we may observe, somewhat surprised that upon the facts they came to that conclusion; but assuming, for the purposes of this case, that it was correct, we are nevertheless of opinion that they were right in holding the appellant liable. They find in distinct terms that Byegrove Road was not a highway before the passing of the Highway Act, 1835, but that it has since become a highway. This finding is, in our opinion, warranted by the facts, which point to a dedication since 1835, and it must be taken therefore that the road is a highway, but not a highway repairable by the inhabitants at large, none of the formalities required by the Highway Act of 1835 before liability can be thrown upon the public having been fulfilled. We have then to consider whether a place, which is a "highway," but is not a street in the ordinary sense, is a "street" within the meaning of s. 150. We think that the magistrates have rightly held that it is. It is a highway, and thus is certainly within the definition of the word

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in s. 4 of the Act. That section enacts that "in this Act, if not inconsistent with the context, the following words and expressions have the meaning hereinafter respectively assigned to them. 'Street' includes any highway not being a turnpike road, and any public bridge not being a county bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not."

It is contended that inasmuch as s. 150 deals with such questions as paving, sewering, and lighting, the context in s. 150 shews that the ordinary meaning of the word "street" is alone admissible. Having regard to the decision of the Divisional Court in *Reg.* v. *Burnup* (1) and to the doubts expressed by Lord Blackburn and Lord Watson in the *Corporation of Portsmouth* v. *Smith* (2), we are far from saying that there is not much weight in this contention, although, with all deference to those who have thought or decided otherwise, such a construction does not seem to us to be the correct one, and it would certainly lead to much public inconvenience. Had we, however, been of a contrary opinion, we should still have been bound in the present state of the authorities to decide this case against the appellant. We think that the decisions of the Court of Appeal in *Corporation of Portsmouth* v. *Smith* (3) and *Jowett* v. *Local Board of Idle* (4) are absolutely conclusive, and they are binding upon us. The former case, it is true, was concerned, not with the Public Health Act, but with the Towns Improvement Act, 1847; but in the latter statute there is a definition clause similar in terms to that contained in the Act of 1875. It is as follows: "The word street shall extend to and include any road, square, court, alley, and thoroughfare." And at the trial before Lindley, L.J., at Winchester, of an action in which the corporation, who had incurred expenses in paving a road within their district called Asylum Road, sought to recover those expenses from an adjoining owner as expenses in paving a street under s. 53 of the Act, it became necessary to consider the meaning of the word "street" in that statute. The learned judge left, among other questions, the following question to the jury: "Was Asylum Road a street

(1) 50 J. P. 598.
(2) 10 App. Cas. 364.
(3) 13 Q. B. D. 184.
(4) W. N. (1888) 87.

in the popular acceptation of the term?" and they answered in the negative. The learned judge agreed that this was a correct finding in fact; the road was really a country lane, but he said: "I do not see how I can possibly get out of the language of s. 3, which says a street shall include that which this lane really is, and, although the lane is not a street in the ordinary acceptation of the word, I cannot say it is not a street within the parliamentary definition." The Court of Appeal, whilst differing from the learned judge upon another point in the case, upheld this construction of the statute. The Master of the Rolls (at p. 195) thus expresses himself upon the point: "It has been contended that the Asylum Road is not a street, but it is a thoroughfare. It is true that Asylum Road is not a street, if a street means a way bounded on either side by houses, and we are bound by the finding of the jury to take it that Asylum Road was not a street in the popular sense of the word. We must consider, however, whether it is a street within the meaning of the statute 10 & 11 Vict. c. 34. The interpretation clause referred to during the argument provides that "the word street" shall extend to and include any road. The intention of the clauses is that in construing the Act the word, in addition to its ordinary meaning, shall bear the meanings mentioned in the section—the words "shall include" mean "shall have the following meanings in addition to its popular meaning." I was a member of the Court of Appeal when *Robinson* v. *Barton Local Board* (1) was decided. I find I expressed myself in the following terms: "I think that the first remark to be made on the Act of Parliament is that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language, without the help of an Act of Parliament, would have called a street. And the other is a street which everybody, without the aid of an Act of Parliament, would have called a street. The interpretation clause includes under the word 'street' things which no one in ordinary parlance would call streets, as for instance a highway which has not a house on either side of it. But where there is a certain number of houses on either side of a thoroughfare or a roadway, whichever you please to call it, everybody, without the

(1) 21 Ch. D. 621, at p. 634; 8 App. Cas. 798.

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assistance of any Act of Parliament, would call that thing a street, and call it nothing else. Therefore there are two totally different kinds of streets mentioned in the Act . . . I adhere to the language which I used in that case." The learned Master of the Rolls goes on to state that he differs from *Maude* v. *Baildon Local Board* (1), where a Divisional Court had held they were not bound by s. 4 of the Act of 1875 to hold a road, found by the justices not a street in the ordinary sense, to be a street within s. 150. Baggallay and Bowen, L.JJ., agreed with the Master of the Rolls, and although when the case went to the House of Lords two of the learned lords, as we have said, expressed themselves in language which throws some doubt upon the matter, the decision of the Court of Appeal was not overruled upon the point. In *Reg.* v. *Burnup* (2) the Divisional Court seem to have acted on the dicta of the judges in the House of Lords, and decided that in s. 150 "street" means street in the ordinary sense, but since that decision the Court of Appeal have reiterated their view of the true construction of the word in the case of *Jowett* v. *Local Board of Idle.* (3) There a jury had found in general terms, in an action of trespass brought against the defendants who had entered on the plaintiff's land in order to pave, that the place in question was not a street; but Manisty, J., notwithstanding this finding, entered judgment for the defendants, the place being admittedly a street within the language of s. 4. His decision was upheld by the Divisional Court (4), who declined to follow *Reg.* v. *Burnup* (2), that case being in their judgment inconsistent with the decision of the Court of Appeal in the *Corporation of Portsmouth* v. *Smith.* (5) The case was taken to the Court of Appeal, who considered that they were entitled to adhere, and stated that they did adhere, to their decision in the *Portsmouth Case.* (6) Under these circumstances we feel bound to hold, and we may say that in the absence of authority we should have held, that Byegrove Road is a street within the meaning of s. 150 of the Public Health Act, 1875, and that the

(1) 10 Q. B. D. 394.
(2) 50 J. P. 598
(3) W. N. (1888) 87.
(4) 36 W. R. 138.
(5) 13 Q. B. D. 184; 10 App. Cas. 364.
(6) W. N. (1888) 87; 36 W. R. 530.

respondents can recover the expenses claimed. The order, therefore, will stand, and the appeal be dismissed with costs.

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Appeal dismissed.

Solicitors for the appellant: *Withers & Withers.*

Solicitor for the respondents: *S. G. Edridge, Croydon.*

P. B. H.

BELLYSE *v.* M'GINN.

April 18.

Bankruptcy—Protected Transactions—Notice of Bankruptcy Petition—Notice served on Sheriff of Bankruptcy Petition against or by Debtor—Execution Creditor—"Sheriff"—Man in Possession—"Officer charged with the Execution of a Writ or other Process"—46 & 47 *Vict. c.* 52, *s.* 168—53 & 54 *Vict. c.* 71, *s.* 11, *sub-s.* 2.

A man who seizes, keeps possession of, and sells the goods of a judgment debtor by direction of the sheriff, is not an "officer charged with the execution of a writ or other process," and therefore is not a "sheriff" within the meaning of s. 168 of the Bankruptcy Act, 1883, and therefore notice to him, within fourteen days after sale, of a bankruptcy petition having been presented against or by the debtor, is not notice to the sheriff within the meaning of s. 11, sub-s. 2, of the Bankruptcy Act, 1890, and does not entitle the official receiver or trustee in bankruptcy to the balance of the proceeds of sale under that section.

Opinion of the Court of Appeal in *Ex parte Warren, In re Holland* (15 Q. B. D. 48) followed.

APPEAL by the official receiver in bankruptcy from the order of a registrar in bankruptcy at Liverpool, refusing to direct that the proceeds of the sale of certain goods which had been seized in execution should be paid to the official receiver.

The facts were shortly as follows:—

Goods belonging to the judgment debtor, M'Ginn, were seized in execution, at the suit of the judgment creditor, Bellyse, by a man named Ambler, acting under the direction of the sheriff of Lancashire. While Ambler was in possession of the goods, a claim was made under a bill of sale. An interpleader order was thereupon made, the claimant being directed to pay money into Court. He failed to comply with this order, and Ambler afterwards sold the goods. Within fourteen days after the sale a bankruptcy petition was presented against the judgment debtor,

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and notice of this petition was served on Ambler, but was not served on the sheriff. Afterwards the judgment debtor was adjudged bankrupt.

The official receiver appealed to Denman, J., who referred the matter to the Court.

Joseph Walton, for the appellant. There was a service of notice of the bankruptcy petition on the sheriff within the meaning of s. 11, sub-s. 2, of the Bankruptcy Act, 1890 (1), which was sufficient to entitle the official receiver to the proceeds of the sale: *Heathcote* v. *Livesley*. (2) Ambler was the "sheriff" within the meaning of s. 168 of the Bankruptcy Act, 1883 (3), for he was "charged with the execution of a writ." His own affidavit shews the position he occupied, for he describes himself as "Thomas Ambler, officer to the sheriff of Lancashire," and further states that "this application is made to the Court for the protection of the sheriff and myself as his officer." *Ex parte Warren, In re Holland* (4) is distinguishable, for there the agency had been determined.

[VAUGHAN WILLIAMS, J. If the observations made by the judges of the Court of Appeal in that case are correct, how can it be contended that notice to Ambler was notice to the sheriff?]

Those observations were unnecessary for the decision of the case.

Carver, for the execution creditor, referred to *Dibb* v. *Fer-*

(1) By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 2: "Where under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

(2) 19 Q. B. D. 285.

(3) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168: "In this Act, unless the context otherwise requires . . . . 'sheriff' includes any officer charged with the execution of a writ or other process."

(4) 15 Q. B. D. 48.

guson (1), in which Lord Coleridge, C.J., and Wills, J., followed the opinion of the Court of Appeal in *Ex parte Warren, In re Holland* (2). He was stopped by the Court.

D. Warde, for the sheriff.

MATHEW, J. This appeal must be dismissed. An execution creditor having seized the goods of his debtor, a claim was made by the holder of a bill of sale, and the usual interpleader order was made, and money was ordered to be paid into Court. This order not having been complied with, the goods were sold by the man in possession, Ambler, who was employed by the sheriff. Within fourteen days a bankruptcy petition was presented against the debtor, and notice of the petition was served on Ambler. The question which we have to determine is whether such service was sufficient service on the sheriff within the meaning of 53 & 54 Vict. c. 71, s. 11, sub-s. 2. By that enactment the sheriff, after deducting his costs, is to retain the balance of the proceeds of the sale for fourteen days, "and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor," and a receiving order is made, of which the sheriff has notice, the balance is to be paid to the official receiver or trustee. We have therefore to see the meaning of the word "sheriff," as defined by the interpretation clause of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 168). By that section, "'sheriff' includes any officer charged with the execution of a writ or other process." But a man in possession is not charged with the execution of process. No writ is directed to him, and he is in no sense an officer of the court. In *Ex parte Warren, In re Holland* (2), the Master of the Rolls went into the history of the interpretation of the word "sheriff," and, speaking of the interpretation clause in the Act of 1883, to which I have referred, he said, "This, as it appears to me, means that the word 'sheriff' includes persons who discharge duties similar to those which are discharged by a

(1) Not reported. The decision was pronounced on June 16, 1890, and the provision on which it turned (46 & 47 Vict. c. 52, s. 46, sub-ss. 1, 2) was repealed by s. 29 of 53 & 54 Vict. c. 71 (which was passed on August 18, 1890, and came into operation on January 1, 1891), and is re-enacted, with slight variations, by s. 11 of that Act.

(2) 15 Q. B. D. 48.

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sheriff—not every bailiff or man in possession . . . . In my opinion, in the case of a sheriff, it would not be sufficient to serve the notice on the bailiff or the man in possession under the writ; the notice should be given to the sheriff, or to some recognised agent of his for receiving such notices, i.e., to the under-sheriff, or to a clerk at the sheriff's office. . . . . I think that such a notice could not be effectually given to a sub-agent of a sheriff, appointed by him for the discharge of some other part of his duty, but not for the purpose of receiving notices." (1) Baggallay, L.J., expressed himself to the same effect, and Bowen, L.J., agreed. In the present case the first intimation of the presentation of the bankruptcy petition was given to the sheriff after the expiration of the fourteen days. It is further urged that the execution creditor had notice of an act of bankruptcy, but the evidence does not bear this out. The order of the registrar was right.

VAUGHAN WILLIAMS, J. I am of the same opinion. I do not think that Ambler was an "officer charged with the execution of a writ or other process" within the meaning of s. 168 of the Bankruptcy Act, 1883, nor do I think that his employment was such as to render him the agent of the sheriff for the purpose of receiving notice.

Appeal dismissed.

Solicitors for the appellant: *Toulmin, Lawrence & Shield, Liverpool.*

Solicitors for the execution creditor: *Wynne, Holme & Wynne, for J. M. Quiggin & Brothers, Liverpool.*

Solicitors for the sheriff: *Johnson & Dowding.*

(1) 15 Q. B. D. 48, at p. 52.

P. B H.

IN RE JONES. EX PARTE LLOYD.

1891
June 22.

Bankruptcy—Assets—Salary or Income—Power to order Payment to Trustee —Wages of Workman—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 53, *sub-s.* 2.

Wages earned by a workman employed in a colliery are not "salary or income" within the meaning of s. 53, sub-s. 2 of the Bankruptcy Act, 1883, and therefore no order can be made under that section for payment of any part of such wages to the trustee in bankruptcy of the person by whom the wages are earned.

Ex parte Benwell, In re Hutton (14 Q. B. D. 301) followed.

APPEAL from the county court at Wrexham.

The respondent was a workman in the employment of a colliery company, and was earning wages which averaged about 25*s.* to 30*s.* a week. The appellant obtained judgment against the respondent in the county court for 50*l.* damages and costs. The respondent then filed his petition in bankruptcy. There were no other creditors besides the appellant. The official receiver, as trustee in the bankruptcy, applied to the judge of the county court for an order, under s. 53, sub-s. 2 of the Bankruptcy Act, 1883, for the payment to him of a part of the wages earned by the respondent. The judge refused to make an order, and the present appeal was from such refusal.

F. Cooper Willis, for the appellant. An order ought to be made. The case comes within the words of the Bankruptcy Act, 1883 (52 & 53 Vict. c. 52), s. 53, sub-s. 2: "Where a bankrupt is in the receipt of a salary or income other than as aforesaid." If not "salary," the bankrupt's earnings in the present case are "income": *In re Brindley, Ex parte Brindley.* (1)

E. Honoratus Lloyd, for the respondent, was not heard.

CAVE, J. This appeal must be dismissed. An interpretation has been placed on the expression "salary or income other than as aforesaid" both in the case referred to by Mr. Cooper Willis, *In re Brindley, Ex parte Brindley* (1), and in the case of *Ex parte Benwell, In re Hutton* (2), where the Court of Appeal

(1) 4 Morrell's Bankruptcy Reports, 104. (2) 14 Q. B. D. 301.

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held that although the debtor was making large sums of money, amounting to more than 1000*l.* a year, yet, inasmuch as he was not entitled to receive that money with respect to any particular period, such as a year or some part of a year, irrespective of the amount of work he did, the money so received was not "income" ejusdem generis with "salary," within the meaning of the Bankruptcy Act, and therefore an order could not be made to pay any part of his earnings to his trustee in bankruptcy, to be applied for the benefit of his creditors. I cannot distinguish the case of a working collier from that case, for there it was pointed out that it was impossible to compel the debtor to go on working and earning money, and in the same way, here, if the debtor does not choose to go to work he will earn nothing. It is impossible to say that the wages of a working man come within s. 53 of the Bankruptcy Act, 1883.

CHARLES, J. I am of the same opinion. The judgment in *Ex parte Benwell, In re Hutton* (1) is decisive of the present case.

Appeal dismissed.

Solicitors for appellant: *Hamlin, Grammer, & Hamlin, for Cartwright, Chester.*

Solicitors for respondent: *Rooke & Sons, for Wynn Evans, Wrexham.*

(1) 14 Q. B. D. 301.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1891
May 28.

ARMOUR *v.* BATE.

Practice—Trial—Default of appearance of Plaintiff—Form of Entry of Judgment—Order XXXVI. *r.* 32.

If, when a trial is called on, the defendant appears and the plaintiff does not appear, and there is no counter-claim, the defendant is not entitled under Order XXXVI., r. 32, to have judgment entered for him, but judgment should be entered dismissing the action for default of appearance of the plaintiff.

APPEAL from the judgment of Wills, J., at the trial without a jury.

The action was brought to recover a sum of 300*l.* deposited by the plaintiff with the defendant, who was his employer. The defendant's pleadings did not deny the deposit, but averred that it had been made in lieu of a fidelity bond, and as an indemnity to the defendant, and there were alternative averments of dishonesty or negligence by the plaintiff entitling the defendant to indemnify himself, out of the sum so deposited, for loss arising from the acts of the plaintiff. There was also a counter-claim. The plaintiff did not appear, and counsel for the defendant abandoned the counter-claim, and asked for judgment. Judgment was accordingly entered for the defendant.

The plaintiff appealed.

J. Walton, in support of the appeal. By Order XXXVI., r. 32, "If, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action." This rule does not apply when the burden of proof is on the defendant; but, at any rate, the judgment entered for the defendant is wrong. The effect of it is to give judgment for the defendant on all the issues, and so to convict the plaintiff of the alleged fraud without any proof whatever. If a judgment dismissing the action had been entered the plaintiff might have applied to set aside the judgment under Order XXXVI., r. 33, but as the judgment entered was wrong his only course was to appeal against it.

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Gully, Q.C., and *C. A. Russell*, contrà. Under Order XXXVI., r. 32, there is no question whether the onus of proof is on the defendant except that, under the latter part of the rule, "if he has a counter-claim, then he may prove such counter-claim so far as the burden of proof lies upon him." In all other cases if the plaintiff does not appear at the trial to ask for the relief which he seeks by his pleadings, the defendant is entitled to judgment.

J. Walton, in reply.

LORD ESHER, M.R. In this case the defendant was the employer of the plaintiff and had taken from him a deposit of 300*l.* by way of security for his good behaviour. The employment has come to an end, and the plaintiff has sued to recover the deposit. The defendant by his pleadings admitted that he had received that sum of money, but alleged misbehaviour on the part of the plaintiff, some of it amounting to fraud on his part, justifying the forfeiture of the money. On each charge of misbehaviour the plaintiff took issue. There was some question raised as to whether the plaintiff appeared at the trial, but it is obvious to us that he did not do so, and that thereupon the judge might act under Order XXXVI., r. 32. In this case there was a counter-claim on the pleadings, but it was withdrawn. On the other part of the pleadings the burden of proof if the case had been tried out would have been on the defendant. Under these circumstances, the plaintiff being absent and the defendant appearing, the judge, on the application of the defendant's counsel, ordered, as appears by the certificate of the associate, that judgment should be entered for the defendant. Thereupon the plaintiff did not act upon rule 33 of the same order, and ask that this judgment might be set aside as he might have done within six days after the trial, but waited sixteen days and gave notice of appeal. It was argued that rule 32 did not authorize the entry of judgment for the defendant because the burden of proof was on him. But the words of the rule seem plain, and they say nothing about the burden of proof except in the case of a counter-claim. The learned judge was perfectly right in not inquiring as to the burden of proof. But then it is said that

judgment should not have been entered for the defendant, but that there should have been judgment dismissing the action, and the plaintiff's point is that, as he was charged with fraud, if the judgment stands it amounts to a finding that he has been guilty of fraud, whereas all that should be found is that he did not appear at the trial. There is no form given in the rules for a judgment dismissing an action, and so far as I know there never was such a form on the common law side. If an action was dismissed it was so by an order of a judge, and no judgment for the defendant was drawn up. On the Chancery side, before the Judicature Act, Order XXIII., r. 13, of the Consolidated Orders provided for the case of the default of the plaintiff when a cause was called on, and the form in use, given in Seton on Decrees, recited that the plaintiff had not attended, and ordered that the bill should stand dismissed with costs. After the Judicature Act, Order XXXVI., r. 19, of the rules of 1875 applied to such a case, and the form which appears to have been in use in the Chancery Division recited that no one appeared for the plaintiff, and ordered that the action should stand dismissed out of Court. For that rule Order XXXVI., r. 32, has been substituted, which is to the same effect. These rules were applicable to both divisions, and one would have expected that if there was to be this procedure replacing the practice in the Chancery Courts and making a new one in the Common Law Courts, that a form would have been found in the rules; but there is none, and it would seem the best course for us to indicate what the form should be. We think that the judgment should be drawn up stating that the action was dismissed for want of appearance of the plaintiff at the trial. The form would be much the same as that formerly in use in the Chancery Division, and its effect will be the same as if the action had been dismissed on the merits; that is, it will give the defendant the costs of the action, and of all the issues that were to be determined between him and the plaintiff. It appears therefore, that the plaintiff has practically failed in this application, the difference between the judgment drawn up and that which we shall direct being a matter of form as far as he is concerned. The appeal must therefore be dismissed with costs, but the judgment will be amended by

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being drawn up in a form corresponding with the words of the rule.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Hamlin, Grammer, & Hamlin, for Cartwright & Co., Liverpool.*

Solicitors for defendant: *Cunliffes & Davenport, for W. H. Churton, Chester.*

A. M.

June 5

HAYWARD *v.* MUTUAL RESERVE ASSOCIATION.

Practice—Reference—Official Referee—Jurisdiction to order Commission to examine Witnesses—Jurisdiction to review Referee's Decision—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15, 16—*Rules of Supreme Court,* 1883, *Order* XXXVI., *rr.* 48, 49, 50.

An official referee, to whom an action is referred for trial, has jurisdiction to make an order granting a commission to examine witnesses abroad, and a judge at chambers has jurisdiction to review the decision of the official referee granting or refusing such an order.

OPPOSED motion, raising the question whether an official referee, to whom an action has been referred for trial, has jurisdiction to grant a commission to examine witnesses abroad, and further whether the decision of the referee granting or refusing an order for a commission can be reviewed by the judge at chambers, or whether an application for that purpose ought to be made to a Divisional Court.

The official referee having refused an order for a commission on the merits, an appeal was brought before the judge at chambers, and Henn Collins, J., referred the matter to the Court.

Bonsey, for the defendants. The official referee had jurisdiction to make the order asked for, and the judge at chambers had jurisdiction to entertain an appeal from his decision refusing it. Rules of Supreme Court, 1883, Order XXXVI., rr. 48, 49, 50, Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 14, 15, 16;

Richard v. *Talbot* (1); *Byrne* v. *Brown*. (2) The order for a commission is an order made "in the conduct of any reference or trial" within the meaning of r. 50, and therefore that rule expressly confers on the official referee jurisdiction to make such an order. There is a trial here within the meaning of r. 50, for two actions were consolidated, and compulsorily referred for trial. The order is an order as to evidence which r. 49 shows can be made. The appeal from the official referee was rightly brought to the judge at chambers. *In re Leigh, deceased; Rowcliffe* v. *Leigh*. (3)

T. W. Chitty, for the plaintiff. The official referee has no jurisdiction to make the order: *Dauvillier* v. *Myers*. (4) This is not an order "in the conduct of any reference or trial." If it had been intended to give power to make such an order, the words of Order XXXVI., r. 50, would have been "in the course of the proceedings," or something to that effect. The rule expressly gives power to order discovery and inspection, but stops there. The jurisdiction of a master is expressly conferred on a district registrar by Order XXXV., r. 6, but there is no corresponding provision applicable to an official referee. No appeal lies to the judge. The rules are silent as to interlocutory orders of this kind, and give no jurisdiction to make them, and if there is no such jurisdiction there can be no appeal. The proper course would have been to take out a summons before the master, who could have asked for the official referee's opinion. Order XL., r. 6, Order LIX., r. 3, and the Judicature Act of 1884 (47 & 48 Vict. c. 61), s. 8, give a right of appeal under certain circumstances, but do not apply to a case like the present.

Bonsey, in reply. The official referee is an officer of the Court, and therefore the Court has an inherent jurisdiction to review the exercise of his discretion, which jurisdiction, in the absence of any statute or rule to the contrary, may be exercised by a judge at chambers. *Forster* v. *Edwards* (5); *Walmsley* v. *Mundy* (6); *Bryant* v. *Reading*. (7)

(1) 38 W. R. 478.
(2) 22 Q. B. D. 657.
(3) 4 Ch. D. 661.
(4) 17 Ch. D. 346.
(5) 48 L. J. (C.P.) 767.
(6) 13 Q. B. D. 807.
(7) 17 Q. B. D. 128.

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DENMAN, J. In this case some considerable difficulty arises from the wording of the rules. The question raised turns mainly on the construction of Order XXXVI., rr. 49 and 50. By rule 50: "Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court." The question really turns on the meaning of the words, "in the conduct of any reference or trial." I agree that the natural meaning of those words is more restricted than the meaning which I feel bound to give to them, for generally such words would mean what goes on at the actual trial, the expression used not being "in the conduct of the proceedings." But, on consideration, I have come to the conclusion that the words ought not to be confined to the mere proceedings at the trial. An order of reference is made, and the official referee has to decide the question referred to him. It may be only a sub-division of the case which is referred, or it may be the trial of the whole cause, but in both cases it is a reference before the official referee; and the words I have referred to will cover all cases which are referred to the official referee. If that is so, we cannot restrict the meaning to merely what occurs during the actual trial where the whole matter is referred. The expression used means in the conduct of the proceedings where matters are referred to the referee. He has power expressly given to him as to discovery and production of documents, and such matters are within the powers of a judge in the conduct of a trial. Moreover, the official referee is in the position of an officer of the Court, and it follows that if he makes a mistake, there is power to come to the Court to set him right. No doubt, in the notice of motion the application is stated to be by way of appeal, but it is in fact a substantive application to the Court, asking the Court to do what, it is contended, the official referee ought to have done in the first instance. As we take this view, it is agreed that the matter shall go back to the judge at chambers to decide as to the merits.

As to the question of jurisdiction, I think it is clear that the Court has the power to set the official referee right, and I do not

think that either rule 48 or rule 49 of Order XXXVI. contains any language qualifying or interfering with that which, though not without some doubt, I consider to be the true construction of rule 50. For these reasons, I am of opinion that the official referee has power to order a commission to issue, and the appeal was rightly brought to the judge at chambers; and, therefore, we ought now to make an order referring the matter back to the learned judge to decide whether on the merits a commission ought or ought not to issue.

WILLS, J. I am of the same opinion. An order of reference was made under s. 14 of the Arbitration Act, 1889 (52 & 53 Vict c. 49), by which the whole cause was ordered to be referred for trial before the official referee. Then by s. 15 the referee is to be deemed to be an officer of the Court, and is to have such authority, and to conduct the reference in such manner as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct. Surely, that must apply to this case, for the words are wide enough to cover all cases of a reference by order of the Court. So far as the rules do not extend, a judge may make an order as to the manner in which the reference is to be conducted. Rules 49 and 50 of Order XXXVI. are somewhat difficult to construe from a grammatical point of view. A difficulty arises as to the meaning of the words "the same" in rule 49. There is no antecedent, and nothing is mentioned in the rule to which the expression can refer, but I think it must mean subject to any limitation of the order which may be imposed. The words "conduct the reference" in s. 15 appear to be large enough to include the case of proceedings which are ancillary to the actual trial and necessary to bring about the proper result, and I do not see why discovery and production of documents, which are expressly provided for by Order XXXVI., r. 50, should be put on a different footing from the power to grant a commission.

Then the further question arises, whether there is an appeal from the decision of the official referee. I am of opinion that there is. The official referee is an officer of the Court, and as such is subject to the control of the Court. An analogous case is the case of taxation of costs by the master. Such taxation has

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always been held to be subject to review by the Court, but such review is not strictly an appeal. I have myself taken the same view sitting on the Railway and Canal Commission. The question there raised was whether an appeal would lie to me from the registrar's taxation of costs. The rules are silent as to the point, but, nevertheless, I arrived at the conclusion that I had jurisdiction to review the registrar's taxation. On the same principle, it seems to me that in the present case the official referee is subject to the control of the judge, because he is an officer of the Court. The cases which have arisen under the Lands Clauses Acts (1), where the Court has declined to review the master's taxation, are distinguishable, because in those cases it was held that the master was not acting as an officer of the Court, and was not exercising the jurisdiction of the Court, but was acting as a "persona designata," being the person specially appointed by statute to tax the costs.

For these reasons, I am of opinion that the question ought to be referred back to the learned judge at chambers to decide on the merits.

Order referring question to chambers.

Solicitor for plaintiff: *F. W. Spencer.*

Solicitors for defendants: *Foss & Ledsam.*

(1) *Owen* v. *London and North Western Ry. Co.* (Law Rep. 3 Q. B. 54); *Sandback Charity Trustees* v. *North Staffordshire Ry. Co.* (3 Q. B. D. 1).

P. B. H.

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[IN THE COURT OF APPEAL.]

IN RE AN ACTION PENDING IN SCOTLAND.
BURCHARD AND OTHERS *v.* MACFARLANE AND OTHERS.
EX PARTE TINDALL AND DRYHURST.

Practice—Commission issued by Court in another part of the United Kingdom —Production of Documents—Persons not parties to the proceeding—6 & 7 Vict. c. 82, s. 5.

In pursuance of a commission issued by the Court of Session, in an action pending in Scotland with regard to the sale of a vessel by the defenders to the pursuers, an order was made at chambers under 6 & 7 Vict. c. 82, s. 5, that the chairman and secretary of Lloyd's should attend before the commissioner for examination as to, and to produce the documents which Lloyd's had under their control answering the description in the specifications of documents by the pursuers and the defenders. The specifications stated that the documents called for were correspondence between Lloyd's and their surveyor at Hamburg, relating to the condition or the surveys of the vessel between certain dates, and all reports and communications addressed to Lloyd's by their agent at Hamburg relating to these matters. On appeal against this order:—

Held (reversing the decision of the Queen's Bench Division), that the only process intended to be enforced by the statute was the production of documents as ancillary to the examination of a witness; that the order amounted to one for discovery against persons not parties to the action; and that there was no jurisdiction to make such an order.

APPEAL from an order of the Queen's Bench Division.

The action was pending in the Court of Session in Scotland, and arose out of a contract by the pursuers to purchase from the defenders a vessel called the *Lady Octavia*. In this action, the Lord Ordinary granted a commission to examine certain witnesses and granted diligence against havers, at the instance of both parties, for recovery of the documents specified in their respective specifications, Nos. 22 and 23 of process and commission, to certain named commissioners to take the oaths and examinations of the havers, resident in Germany, London, Glasgow, and Edinburgh respectively, and receive their exhibits and productions, and ordained "Mr. A. H. Tindall, chairman, and Mr. A. G. Dryhurst, secretary of Lloyd's Register of British and Foreign Shipping, to appear before the commissioner in London and produce any of the documents called for, so far as under their control."

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The specification No. 22 of documents called for by the pursuers was: "All correspondence passing between the defenders or Barr, their surveyor, or any person on their behalf, on the one hand and Emil Padderatz, surveyor at Hamburg, to Lloyd's Register of British and Foreign Shipping, or any one on his behalf on the other, relating to the condition of the vessel known as the *Lady Octavia*, or the surveys of said vessel in 1889 and in July and October 1890, between January 1, 1889, and the date of raising this action. 2. All correspondence between the said Emil Padderatz on the one hand and the London office of said Lloyd's Register of British and Foreign Shipping or any of the officials of said register relating to said matters prior to said date. 3. All reports obtained by, and all communications addressed to said Lloyd's Register of British and Foreign Shipping or any of the officials of said register in reference to said vessel during the years 1889 and 1890. 4. Failing principals, copies, drafts, scrolls or jottings of any of the above documents are called for." The specification, No. 23 of documents called for by the defenders was, "all correspondence passing between the pursuers or any one on their behalf on the one hand and Lloyd's, or Lloyd's Register of British and Foreign Shipping, or W. H. Tindall, the chairman, and A. G. Dryhurst, the secretary, or any one on behalf of or as representing Lloyd's or Lloyd's Register of British and Foreign Shipping, on the other hand, relating to the vessel referred to on record as the *Lady Octavia*, between May 1, 1890, and the date of raising the present action." A copy of the interlocutor was duly served and the commissioner cited Messrs. Dryhurst and Tindall respectively, "to attend to produce the documents mentioned in the specifications served upon you, and give your oath and examination respecting the same on behalf of the pursuers." Failing the appearance of Messrs. Tindall and Dryhurst, a summons was taken out before a judge at chambers, who ordered them to attend before the commissioner at such time and place as he might appoint, "for examination as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession answering the description mentioned in the specifications Nos. 22 and 23, of process in the said action, and also that

they do respectively produce to the said commissioner the documents mentioned in the said specifications (without prejudice to the said W. H. Tindall and A. G. Dryhurst's objections before the commissioner as to all or any class of documents or document, or to further application by pursuers to a judge in any such case)."

On appeal to the Queen's Bench Division the Court affirmed this order.

Messrs. Tindall and Dryhurst appealed.

Sir R. E. Webster, A.G., and *Cohen, Q.C.* (with them *James Fox*), in support of the appeal. This is an attempt to obtain discovery from a witness, and not merely an application for the production of documents as ancillary to his examination. It purports to be made under 6 & 7 Vict. c. 82, s. 5 (1); but the clause in that section as to documents only means that on the examination of a witness he may be ordered to produce documents, and does not give rights over third parties other than witnesses. This order, however, does not purport to treat either of the applicants as witnesses, but calls on them to ascertain and disclose the documents in their possession, which are their exclusive property. If

(1) 6 & 7 Vict. c. 82, s. 5: "And whereas there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the Courts of Law or Equity in England or Ireland, or by the Courts of Law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof: Be it, therefore, enacted, that if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior Courts of Law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such Courts, for a rule or order to compel the person or persons so failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission, and it shall be lawful for the Court or a judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned in such rule or order."

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the order of the judge at chambers is upheld, the English Court would be making an order in aid of the parties to the Scotch action which it could not make in a case within its own jurisdiction. The principle that governs this case is that on which the Court of Appeal decided *Elder* v. *Carter* (1), which arose under Order XXXVII., r. 7.

J. G. Barnes, Q.C., and *Lyttelton*, contrà. This is not a mere order for the production of documents, but it is intended to call the applicants as witnesses, and when they are called they will be asked to produce the letters and report. There is a question as to the class of the vessel, and the surveys are required in order to prove or disprove the breach of warranty on which the action proceeds. The order itself shews that a Scotch Court would call for the production of these documents by a witness, and the effect of the statute is to enable the Court to enforce here whatever the Scotch Court would enforce within its own jurisdiction. This view is supported by the preamble to the section, which clearly contemplated the existence of different laws in different parts of the United Kingdom.

LORD HALSBURY, L.C., after dealing with the circumstances under which the action arose, continued: I do not find any evidence that there are in fact documents in existence such as might be conjectured from the form of this order. The documents, if they exist, relate, by the hypothesis upon which the order is made, to the business of third parties, and not to any right existing between the pursuers and the defenders. They are a correspondence and a report between Lloyd's and Lloyd's agent. It is true that they have relation to the particular vessel which is the subject of sale, but that only happens by reason of the peculiar form of incorporation which Lloyd's possess which enables them to class vessels.

Sitting in this Court, and treating the dispute as if it had happened in England, I am bound by the decision of the Court of Appeal in *Elder* v. *Carter* (1), and I am remitted consequently to the inquiry, whether or not this is in substance an order for inspection and discovery, or whether it is part of a procedure to

(1) 25 Q. B. D. 194.

examine witnesses in the course of proof for the purpose of establishing the facts. I do not know what facts are to be established. I do not know what documents are asked for. I do not know that the parties have ever condescended upon any particular document, or intimated that they have any knowledge of any document existing at all, and I am led to the conclusion that it is inspection and discovery that is sought, and not proof. The meaning of the order is, as I construe the language of this instrument, that the witness is to be examined if he has got in his possession documents which may become part of the necessary evidence in the cause. If that is the meaning of it, it is quite clear that such a roving order for discovery is not rendered valid because it is limited to a particular ship and the particular years over which these transactions are spread. The order of the Scotch Court has been obtained, not adversely by one of the parties against the other, but by both of them against a third person who has not been consulted, and who has never been heard as to whether or not such an order ought to be made. I am of opinion that to enforce such an order would be a serious invasion of private rights.

I have hitherto spoken as if this was a matter which occurred in England. When I look at the Act of Parliament, it appears to me that the only process intended to be enforced was the production of documents as ancillary to the examination of a witness. If there be any difference between the rights of discovery which exist in Scotland, and the rights of discovery which exist in this country, I can only say that, sitting in this Court, I can only know of such distinction so far as it is brought before me in evidence, and no such evidence has been produced.

There was no evidence to shew any difference between the law of the two countries, or that the Scotch Courts would enforce upon third parties the production of their documents without its being ascertained that they were evidence in any cause, but simply to enable one or other of the parties to ascertain whether the third parties had something in their possession which might possibly serve their purpose in the trial of the cause. The result appears to me to be that, looking at the order of the Scotch Court, and the order that has been made in furtherance of it, we

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ought to come to the conclusion that the latter is not an order which is justified by the 5th section of 6 & 7 Vict. c. 82, but that it is an order which practically and in substance is for discovery under circumstances under which no such order would be made in this country; and I think, therefore, this appeal ought to be allowed.

LORD ESHER, M.R. In this case an order has been made upon Messrs. Tindall and Dryhurst, an order which assumes to be made under 6 & 7 Vict. c. 82, s. 5, and it is objected to that order that the judge had no jurisdiction to make it. That is the question which we have to determine. Now that question raises nothing but what is the true interpretation of the statute, and we have not to consider the law of Scotland, whatever it may be. The order assumes, on the face of it, to be made against Tindall and Dryhurst in an action, and for the purposes of an action, with which they have no relation whatever, to which they are mere strangers, in respect of which they can only be called upon as one calls a witness. It is objected, therefore, on their behalf that the order is beyond the jurisdiction of the judge, first of all because it is made upon third parties who have nothing to do with the action in respect of documents which are not alleged to be the documents of either party in the action, but which are admitted upon the affidavits to be the documents and the property solely of these third parties; and secondly, because it requires them not only to state whether there are such documents, but to produce them, and allow them to be read before it is determined whether they are evidence either on behalf of the plaintiffs or defendants. What the meaning of this document is I confess I have myself no doubt. It is ordered that Tindall and Dryhurst do respectively attend before a commissioner for examination, not for examination in the trial, but for examination "as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession" answering certain descriptions, and those descriptions are of the largest kind; "and also that they do respectively produce to the said commissioner the documents mentioned in the said specifications." Reading the affidavits and this order, and the summons, I

cannot have a doubt that the real meaning of that last part of it is, produce them in order that the persons applying for them may read them and know their contents. The question comes to be whether such an order is within this Act of Parliament. In my opinion it is beyond the jurisdiction of the judge to make the order. He has made an order upon third persons for discovery, and I take it that that has been determined in England, at all events, to be beyond the jurisdiction of the judge, and when I come to this Act of Parliament I shall consider whether it is not the same upon this Act of Parliament. Even supposing that the documents had been identified, and that the witnesses had been asked to produce a document which it is admitted, or shewn clearly, is not the document of either the plaintiff or the defendant, and had been ordered to produce it for the purpose of its being read, not at the trial, but before the trial, not before the examiner as part of the trial but as preliminary to the trial, then in that case also I should have thought that it is beyond the jurisdiction of the judge to make the order. Therefore, there are two defects in it according to that view. Now let us see if the same is true on the construction of this statute. In the Courts of Chancery before the Judicature Acts there was no such thing as a bill of discovery against a third person to discover matters in an action between other parties in which he had no interest. If there were a subpœna duces tecum to the same effect it would have been bad upon this view of the matter, and for the reason that it would be putting upon a witness who had no interest in the matter a burthen that there was no right to put upon him, that is, that he should look through his documents or books, and come to the conclusion as to what was relevant to the inquiry. A subpœna duces tecum was an order from the Court to a person to produce a document which was alleged to be in his possession—to produce it to the Court at the trial, and not to produce it to the parties, for, under a subpœna duces tecum, when a witness brought the document into Court the parties could not ask him for it. The parties have no right to see it, and all that could be done on a subpœna duces tecum was that the witness produced the document to the Court, subject to the order of the Court, not to the

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parties; and he might insist that his document should not be handed to the parties even at the trial. All that could be done was that the Judge, when he was satisfied that it was evidence in the case for either of the parties, might order it to be read. Therefore, the suggestion must be that the Act of Parliament gives, as against third parties, a power which did not exist in any Court as against them before the Act. How was that matter dealt with, in that which was an enactment in almost the words which are found in this Act. Now, the words relied upon in this Act of Parliament are: "An order for the production of any writings or documents to be mentioned in such rule or order." That is as like to these words in Order XXXVII., r. 7, as can be: "The Court or a judge may in any cause or matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order." It was held by the Court of Appeal that, notwithstanding the largeness of those words, when you came to consider what was the purpose of the rule, and that to read it according to the largeness of the words, would enable the parties to the case to do that which before they could not do either at law or in equity, that that was not the meaning of the rule, and that such an order could not be made against a third person who was not a party to the cause.

So far as to Order XXXVII., r. 7. That is a judgment which is binding upon this Court, and, in my opinion, is clearly right. Then, coming to s. 5 of this Act of Parliament, the question is whether we are not obliged to hold the same with regard to this Act. It seems to me that the statute applies to an examination under a commission where the effect is the same as if the witness was being examined in court before a judge, only putting the commissioner in the place of the Court. Where there is an order that a witness is to be examined before the commissioner, it is under the same circumstances as would arise if he were examined at the trial, and the order that may be lawfully made is for the attendance for examination as a witness as if he were at the trial—the production of any writings or documents to be mentioned in the rule or order which may be made for his attendance and examination as a witness, is only equivalent to

saying that he must bring the writings or documents as he would bring them on a subpœna duces tecum. Here that is evaded. The order is for discovery before examination instead of for production on examination. The moment it is admitted that he is a third person and in possession of the document not as the agent of either party, you are asking him to produce the document not to the Court for the purpose of the Court exercising a discretion over it, or determining the legal right, but that it may be shewn to the parties who, until the matter has been determined by a judge, have no right whatever to see it. It seems to me, therefore, that this case is outside the Act of Parliament according to its true reading, and that the learned Judge had no jurisdiction to make the order appealed against.

FRY, L.J. In my judgment this order cannot be made, and ought not to be made under the statute. It is obviously to my mind an order that can only relate to discovery. An examination as to documents means as to the possession of documents, as to what documents are in the custody and power of the person examined, and as to the description of them. That seems to me to be the natural meaning of the order. When I refer to the specifications, to which the order also refers, I find that conclusion confirmed, because the specification does not by date or parties or other simple method of identifying, indicate the instrument, but requires the witness to determine whether documents relate to a particular vessel, and taking the two specifications together it is apparent that the intention is that Lloyd's Register shall go through all the documents in their custody or power, that have passed between themselves and their agents and certain persons named, and ascertain whether or no they have anything whatever to do with this vessel.

The citation follows precisely the same lines, and when I turn to the affidavits which have been made in this case, the conclusion I have come to is rendered still stronger because the affidavits do not shew that Mr. Tindall or Mr. Dryhurst was a person who could give any evidence with regard to the facts which were in controversy between the parties in this suit.

Therefore it is undoubted to my mind that the true conclusion

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Fry, L J.

is that the order really is, what on its face it appears to be, an order that Mr. Tindall and Mr. Dryhurst come before the examiner in order that they may make discovery of documents. It is analogous to a bill of discovery against a mere witness. Now is such an order as that within the meaning of the statute 6 & 7 Vict. c. 82? In my judgment it plainly is not. That statute enables the Court in England or Scotland or Ireland to direct a commission for the examination of witnesses—that means persons who are able to bear testimony with regard to the issues in controversy between the litigant parties. It does not mean that they may be examined with regard to the possession of documents which may be relevant to the controversy between the parties. That observation governs, in my opinion, the whole of the section, and I think the words at the end "for the production of any writings or documents to be mentioned in such rule or order," are only ancillary to the examination of witnesses. The words may enable the parties to require the production of the documents which the witness produces as a witness; but they cannot for one moment be stretched so as to enable any one to obtain discovery against a witness.

Mr. Lyttelton put forward a very ingenious argument indeed, which was this. He said that the law of Scotland must govern the Scotch commission in England, and the law of England must govern the English commission in Scotland, and if the law of Scotland enables you to get discovery against a witness in Scotland, you must be able in England to obtain discovery from the witness in England. There are two answers to that suggestion. In the first place I do not think that it is the true meaning of the clause; but even if it were, there is no evidence at all before us that in Scotland discovery can be obtained against a witness. If that were the Scotch law it must be borne in mind that the English Court must exercise a discretion. I say without hesitation if I were the Judge at Chambers, I never would make an order which enabled a Scotch commission in England to obtain discovery of documents from a mere witness in the cause. Therefore I do not doubt that even if Mr. Lyttelton were right in his contention, and the law of Scotland is that which he suggests ought to be gathered from this consent order, the Court of

England should not follow it in granting discovery against a mere witness. It is to be observed that according to the law of England, as it exists at the present time, it is impossible to obtain discovery against a witness by any process. In the old Court of Chancery you might maintain a bill for discovery, but in order to maintain a bill for discovery it was necessary to shew the interest of the plaintiff in the documents to be discovered, the interest of the defendant in the documents to be discovered, and the right of the plaintiff as against the defendant to the production of the documents that were discovered. Without that the bill was demurrable. It is obvious that such a bill never could lie against a witness.

In the same manner with regard to a subpœna duces tecum. You never could call on a witness to ascertain whether documents related to a particular matter in controversy. That case came before the Court of Chancery in *Lee* v. *Angas* (1), where a subpœna duces tecum was served upon a witness which described the particular documents, and then went on to direct him to produce all documents relating to certain matters in question. It was held that as a subpœna duces tecum it was bad, because it was in fact a bill of discovery against the witness. Then again, under the recent order, Order XXXVII., r. 7, the same observation applies. That rule was undoubtedly conceived in very wide language. It came before the Court of Appeal in the recent case which has been called to our attention; and the Court took the view that, as a right to discovery could not be obtained against a witness, however wide the language of the order, there was no power to get such relief as is sought in this case. It appears to me that if we were to give the slightest countenance to this proceeding we should be doing a great injustice.

It has been said, and not without justice, that it is a remarkable thing, that A., by making a series of false statements against B. and putting them on the back of a writ, or calling them a statement of claim may obtain inspection of the books of B. That is the law, but it has never yet been carried to this extent, that by A. making a statement against B. he can obtain discovery of the books of C. This is an attempt to

(1) Law Rep. 2 Eq. 59.

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carry it to that extent, and therefore, in my judgment, it ought to fail.

Appeal allowed.

Solicitors for the applicants: *Parker, Garrett, & Parker.*

Solicitors for the parties to the action: *Thomas Cooper & Son.*

A. M.

May 28, 29.

CHAPPELL *v.* NORTH.

Arbitration—Submission to Arbitration—Application to stay Proceedings on Counter-claim—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4—"*Step in the Proceedings.*"

By s. 4 of the Arbitration Act, 1889, it is provided that "if any party to a submission . . . commences any legal proceedings in any court against any other party to the submission in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to that Court to stay the proceedings."

The plaintiff brought an action for work done under a building contract, which contained a general submission to arbitration of all disputes arising out of the contract. The defendant counter-claimed for damages arising out of breaches of the contract. Subsequently to the delivery of the counter-claim the defendant took out a summons for directions under Order xxx. for the purpose of obtaining discovery from the plaintiff. On the hearing of the summons the plaintiff applied for and obtained, under rule 2 of that order, leave to administer interrogatories to the defendant. The plaintiff subsequently discontinued his action, and proposed to refer the whole matter to arbitration, and, upon the defendant refusing to allow the counter-claim to be referred, took out a summons under s. 4 of the Arbitration Act, 1889, to stay the proceedings on the counter-claim:—

Held, that the plaintiff's application for leave to administer interrogatories was a step by him in the proceedings, and there was consequently no jurisdiction to make the order.

Semble, that the delivery of a counter-claim is "the commencement of a legal proceeding" within the meaning of the section.

APPEAL from chambers.

The action was brought by a builder to recover a sum of £5453, being the balance of an account for work done and materials provided under a building contract. The contract contained a clause that the builder should not be entitled to any payment except on certificates signed by the architect, and that the final balance should be adjusted by an arbitrator; and it also contained a general submission to arbitration of all disputes arising

out of the contract. The defendant, on December 10, 1890, pleaded by way of defence that no architect's certificates had been given, and that the final balance had not been adjusted by any arbitrator; he also counter-claimed for damages for bad materials and workmanship, and for other breaches of the contract. On January 8, 1891, the plaintiff took out a summons for particulars of the counter-claim. On January 22 the defendant delivered an amended counter-claim, in which he added to his former claim for damages a claim for payment of a sum of £1045, in respect of money due from the defendant to one Hardcastle, a surveyor, for his charges and expenses in measuring up the work, and against which charges and expenses the plaintiff had contracted to indemnify the defendant. On February 12 the defendant took out a summons for directions, for the purpose of obtaining discovery of documents. On the hearing of that summons the plaintiff applied for and obtained leave to administer interrogatories to the defendant, but no interrogatories were in fact delivered under the order.

On various dates between December 31, 1890, and March 20, 1891, the plaintiff obtained formal consents from the defendant to the extension of his time for delivering reply. On March 21 the plaintiff gave notice of discontinuance of the action, and proposed to refer the whole matters in dispute to arbitration, under the general submission contained in the contract. The defendant, however, refused to submit the counter-claim to arbitration. The plaintiff then took out a summons before Wright, J., at chambers, under s. 4 of the Arbitration Act, 1889, for an order that the proceedings on the counter-claim should be stayed. The judge dismissed the summons on the ground that he had no jurisdiction to make the order.

The plaintiff appealed.

Finlay, Q.C., and *F. R. Radcliffe*, for the plaintiff. The judge had jurisdiction under the section. The expression "legal proceedings" includes the delivery of a counter-claim. This point is practically covered by the decision of Mathew, J., in *Spartali* v. *Van Hoorn* (1), where he held that, a counter-claim being in

(1) W. N. (1884) 32.

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substance a cross-action, there was power under s. 11 of the Common Law Procedure Act, 1854, to stay proceedings on a counter-claim, notwithstanding that the section in terms only spoke of staying an action. The judge here, however, also proceeded partly upon the ground that the plaintiff, in obtaining consents to the extension of time for reply, and in taking out a summons for particulars of the counter-claim, had "taken steps in the proceedings." But obtaining a consent is not a step, the consent being applied for with the very object of avoiding the necessity of a step. Nor was the summons for particulars a step. The counter-claim ought to have been sufficiently explicit so as to make such a summons unnecessary, and the only object of the summons was to ascertain whether the counter-claim came within the submission, and whether, consequently, there was anything to refer.

R. T. Reid, Q.C., and *English Harrison*, for the defendant. A counter-claim is not within the section, for the application to stay is to be made "after appearance," and a plaintiff does not appear to a counter-claim. The case of *Spartali* v. *Van Hoorn* (1) is not in point, for the language of the Common Law Procedure Act was different. But, even assuming that a counter-claim is within the section, the plaintiff has taken several steps in the proceedings on the counter-claim. The asking for consent to the extension of time was a step. The consent was given under Order LXIV., r. 8. But for that rule a summons would have been necessary. The substitution of consent for a summons does not make the obtaining of time any the less a step. In any view, it is clear that both the summons for particulars and the application for leave to interrogate the defendant were steps in the proceedings.

Radcliffe, in reply. The section requires the application to be made "before delivering any pleadings or taking any other steps in the proceedings." The words "other steps" must be construed as meaning steps ejusdem generis with the delivery of pleadings—steps which advance the proceedings, such, for instance, as an application to strike out a pleading as bad in law, or payment of money into court. A mere summons for particulars is not a step of that description. But, suppose it was "a step," it was not "a step in the proceedings," for subsequently

(1) W. N. (1884) 32.

to the issue of that summons the defendant amended his counter-claim, and "the proceedings" must mean the proceedings as they stand after amendment. The application for liberty to interrogate the defendant no doubt was subsequent to such amendment, but it was made under Order xxx., r. 2, upon the hearing of a summons for directions taken out, not by the plaintiff, but by the defendant. The step, therefore, was the defendant's step, not the plaintiff's. The leave given to the plaintiff to interrogate was only inserted as a condition in the defendant's order, and, but for the defendant having taken out the summons, would probably never have been applied for, for the plaintiff has never availed himself of it.

DENMAN, J. In this case, the judge at chambers refused to order the proceedings on the counter-claim to be stayed under s. 4 of the Arbitration Act, 1889, on the ground that under the circumstances of the case he had no jurisdiction to do so. I am of opinion that that decision must be affirmed. The action was brought to recover the balance of an account for work done under a building contract. The defendant pleaded by way of defence, that under the terms of the contract, the final balance was to be settled by arbitration, and that no such arbitration had taken place, and also counter-claimed for damages for bad workmanship and other breaches of the contract. The plaintiff thereupon discontinued his action, and proposed to have the whole matter, including the counter-claim, referred to arbitration.

The defendant, however, objected to the reference of his counter-claim, and insisted upon his right to proceed with it. The plaintiff then applied to the judge to have the proceedings in the counter-claim stayed. Sect. 4 provides that, "if any party to a submission . . . . commences any legal proceedings in any court against any other party to the submission . . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings." The first objection taken to the application was that the section did not apply to counter-claims. But a counter-claim is, in

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Denman, J.

reality, nothing but a cross action, and therefore I think we may assume that the delivery of a counter-claim ought to be considered as the "commencement of a legal proceeding." But then it was said that the plaintiff had since the delivery of the counter-claim, "taken steps in the proceedings," and three different matters were relied on as being such steps. The first was that he had obtained a series of consents from the defendant for the extension of time for the delivery of reply. No doubt, if the consent had been refused the plaintiff would have had to take out a summons, and that summons would have been a step. But I do not think that the obtaining a consent, which was asked for for the very purpose of avoiding the necessity of taking a step, can itself be regarded as a step taken. The second matter relied on was, that the plaintiff had taken out a summons for particulars of the counter-claim. I am inclined to think that that did amount to a step in the proceedings, notwithstanding that subsequently to the date of that summons the counter-claim was amended. It was indeed argued that "the proceedings" referred to in the section must mean the proceedings as they stand before the Court in their final shape, but that I think would be too narrow a construction of the section. It is not, however, necessary to decide the point, for, subsequently to the amendment of the counter-claim, upon the hearing of the defendant's summons for directions, the plaintiff applied for and obtained leave to administer interrogatories to the defendant. That I think clearly amounted to a step by the plaintiff in the proceedings, and consequently the judge was right in holding that he had no jurisdiction to make the order asked for.

WILLS, J. I am of the same opinion, though I regret that the effect of our decision will be to prevent the several matters in dispute between the parties from being tried together as a whole. But we have only to deal with the question of the jurisdiction which the legislature in s. 4 has chosen to confer. I agree with my brother Denman that we may consider the delivery of the counter-claim to have been the commencement of legal proceedings, and I am also of opinion that the summons for particulars of the counter-claim was a step taken in those pro-

ceedings; and that, consequently, had nothing else supervened, that summons would have been sufficient to take away the jurisdiction of the Court. But the defendant amended his counter-claim in a substantial particular, and the delivery of such amended counter-claim was, to my mind, a fresh commencement of legal proceedings; so that I think we may disregard the earlier summons for particulars. On this point I am inclined to differ from my brother. But even if my view is right and the delivery of the amended counter-claim was a fresh commencement of legal proceedings, that will not help the plaintiff, for he took a subsequent step when he obtained the order for interrogatories. I cannot think that the obtaining of that order was any the less a step taken by the plaintiff because the application was made upon a summons taken out by the defendant.

Appeal dismissed.

Solicitors for plaintiff: *Mackrell, Maton, & Godlee.*
Solicitors for defendant: *Budd, Johnsons, & Jecks.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
June 8.

IN RE AN ARBITRATION BETWEEN WILLIAMS AND STEPNEY.

Arbitration—Submission before January, 1890—*Arbitration after January,* 1890—*Power of Arbitrator to award Costs—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 2, 25, 26.

By the Arbitration Act, 1889, s. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act," one of which is "the costs of the reference and award shall be in the discretion of the arbitrators or umpire;" and by s. 25, the Act "shall apply to any arbitration commenced after the commencement of this Act (January 1, 1890), under an agreement or order made before the commencement of this Act."

In an arbitration commenced after January 1, 1890, pursuant to a submission, entered into before that date, which was silent as to costs, costs were awarded by the arbitrators:—

Held (reversing the judgment of the Queen's Bench Division), that s. 2 refers to all submissions, whether made before or after the commencement of the Act, and that the arbitrators had power under the Act to award costs.

APPEAL from a judgment of the Queen's Bench Division, reported [1891] 1 Q. B. 700, on an application by Sir E. Stepney,

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one of the parties to an arbitration, to set aside or refer back the award.

The reference was of certain claims by J. R. Williams upon Sir E. Stepney, under a lease of mines and minerals made between their predecessors in title, in 1839, and was pursuant to an arbitration clause contained in the lease. This clause was silent as to costs. The arbitration commenced after January 1, 1890. The arbitrators made an award in favour of J. R. Williams, and directed that Sir E. Stepney should pay the costs of the reference.

The Queen's Bench Division granted an application to set aside or refer back the award, on the ground that the arbitrators had exceeded their jurisdiction in awarding costs. (1)

J. R. Williams, appealed.

W. Blake Odgers, in support of the appeal. The Arbitration Act, 1889, is an Act for amending as well as consolidating the enactments relating to arbitration. Sect. 2 declares that "a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to this Act, so far as they are applicable to the reference under the submission." The schedule declares that the costs of the reference and award shall be in the discretion of the arbitrators or umpire. This is an amendment of the law, and is not confined to submissions after the Act, but gives power over costs in the case of a submission made before the Act, unless there is a contrary intention expressed. Here, no such intention is expressed, for the submission is silent as to costs, and though before the Act the arbitrators could not have awarded them, they have by the Act, express power to do so, as the proceedings in the arbitration were commenced after the Act.

W. Graham and *Gwynne James*, (with them, *Glascodine*), contrà. Sect. 2 cannot have been intended to be retrospective, as such an intention would have been expressed in clear and unambiguous terms. The parties made their agreement in view of the law as it then stood, and in this point of view there is a sufficient expression that the arbitrators should have no power as to costs.

(1) [1891] 1 Q. B. 700.

If s. 2 stood alone, it would not relate to a submission before the Act. Sect. 25 does not say that the Act is to apply to every submission made before the Act, but to any arbitration under such an agreement, so that it does not alter the terms of the submission, but only applies certain matters of procedure in carrying out the arbitration. It would be an anomaly that parties to a submission after the Act should be able to agree that the arbitrators should have no power as to costs, but that parties to a submission before the Act who intended that the arbitrators should have no such power could not have their intention carried into effect.

W. Blake Odgers, in reply, cited *Freeman* v. *Moyes* (1); *Wright* v. *Hale*. (2)

LORD ESHER, M.R. It is the duty of the Court to construe any Act that comes before it, and to deal only with what is expressed in the Act. I am inclined, in interpreting this statute, to think that if s. 2 stood alone we should have to hold that it was not retrospective, and dealt only with submissions made after the Act came in force; but as to those submissions with which it does deal, it certainly may add a number of things which are not in the submission, unless the intention that they should not be added is expressed in the submission. I only state this to shew that the argument that the Act was not intended to add anything to the agreement of the parties to a submission, is not an effective argument. But s. 2 does not stand alone, because it is followed by s. 25. That section says in terms that the Act—that is, the whole of the Act—is to apply to an arbitration commenced after the Act under an agreement or order made before the commencement of the Act. The expression "agreement or order" is, I think, substituted for the word "submission," because it is a larger expression and may include matters which could not technically be described as submissions; but the word "agreement" certainly includes this submission. All depends on the meaning of the expression "this Act" in s. 25. If that means the whole Act, it includes s. 2; and if so, then in this case the submission must be deemed to include the provisions in the

(1) 1 Ad. & E. 338. (2) 30 L. J. (Ex.) 40.

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schedule, one of which is that the arbitrators are to have a discretion as to costs. The 25th section does not say that so much of the Act as applies to the manner of carrying out an arbitration shall apply to such a submission as the present. Unless, then, there is something in the Act or in the nature of the matters it deals with that obliges us to say that the Act must be read with such a limitation, we have no authority to make such an alteration. There is certainly nothing on the face of the Act, but is there anything in the nature of the case? I cannot see that there is, for I think the legislature may well have been disposed to do away with the old rule under which, if a submission says nothing as to costs, the successful party would have to submit to something very like injustice in not being able to obtain costs. I think, therefore, there is nothing in the substance of the Act or in the context which should make us read the Act as inapplicable to the present case. The appeal must be allowed.

LOPES, L.J. I am unable to agree with the decision of the Court below. The case turns on ss. 2 and 25 of the Arbitration Act, 1889. The former appears to me to be a section which has for its object to bring in certain useful provisions of general application into submissions which do not expressly exclude them. I agree that if it stood alone the section would not deal with submissions prior to the Act, but we have also to consider s. 25, and this to my mind is the material section. Reading this section it seems in the first place clear that the expression "this Act" means the whole Act, and must include s. 2 and the schedules; and next it seems to me to be impossible to escape the conclusion that the section was intended to apply, as it does in terms apply, to such a case as the present; and I must add that I can see nothing unreasonable in its so applying and removing the want of power to award costs to the successful party in a prolonged arbitration.

KAY, L.J. I am of the same opinion. What we are asked to do is to read s. 25 as though instead of the words "this Act" it ran thus—"this Act, with the exception of s. 2," shall apply

to such a case as that before us. I may remark that s. 2 introduces into certain submissions the provisions of the 1st schedule. One of these relates to the power of two arbitrators to appoint an umpire. Sect. 26 repeals the enactments described in the 2nd schedule to the extent therein mentioned, and in the schedule we find the Common Law Procedure Act, 1854, ss. 3 to 17 inclusive, which are absolutely repealed. The effect of the argument in support of the judgment of the Court below would be that in a submission which would have been conducted under the provisions of the Common Law Procedure Act, but cannot be in consequence of its repeal, there being no substitute for the repealed sections, no umpire could be appointed. Looking at the words and the scope of the Act, I think that is untenable. I come to a different conclusion from that at which the Court below arrived, and agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Field, Roscoe & Co., for Johnson & Stead, Llanelly; Grundy, Izod & Grundy, for Home & Williams, Llanelly.*

A. M.

WILSON & OTHERS *v.* STATHAM.

April 16, 17; *May* 9.

County Court—Remitted Action—Costs—Taxation—Action of Contract in which more than 50*l. is claimed—Recovery of less than* 20*l. under Order* XIV. *and less than* 50*l. in all the proceedings—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 116.

An action of contract brought in the High Court for more than 50*l.* was remitted to the county court after the plaintiffs had recovered less than 20*l.* under Order XIV. They recovered in all less than 50*l.*:—

Held, that the plaintiffs were not entitled to costs on the Supreme Court scale in respect of the part of the proceedings which had taken place in the High Court.

APPEAL from a decision of the county court judge for Manchester, refusing an application to review the taxation of the costs in an action founded on contract, which had been brought in the High Court for 51*l.* 5*s.* 3*d.*, and, after the plaintiffs had recovered 12*l.* under Order XIV., had been remitted for trial pursuant to s. 65 of the County Courts Act, 1888. The plaintiffs

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recovered in all 34*l.* 10*s.* The items objected to were allowances on the Supreme Court scale in respect of the proceedings prior to the transfer.

Smyly, Q.C., for the defendant, in support of the objections. The effect of s. 116 of the County Courts Act, 1888 (1) is, that as the plaintiffs recovered less than 20*l.*, under Order XIV., before the transfer, the costs of the action before, as well as after the transfer, must be taxed on the county court scale.

Lochnis, for the plaintiffs. The action was brought to recover more than 50*l.*, and could not therefore have been commenced in the county court. For this reason s. 116 (1) does not apply, and s. 65 (1) entitles the plaintiffs to costs on the Supreme Court scale up to the date of the transfer. (2)

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds . . . . it shall be lawful for either party to apply to a judge of the High Court at chambers, to order such action to be tried in any court in which such action might have been commenced, &c. . . . and, on the hearing of the application, the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly . . . . and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court."

By s. 116: "With respect to any action brought in the High Court, which could have been commenced in a county court, the following provisions shall apply:—

"If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds, he shall not be entitled to any costs of the action, and if he shall recover a sum of twenty pounds or upwards, but less than fifty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court: . . . Provided that, if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court or judge thereof, obtain an order under Order XIV. of the Rules of the Supreme Court, empowering him to enter judgment for a sum of twenty pounds or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court."

(2) It appeared from the statement of one of the masters that in the High Court, where an order is made under Order XIV. for less than 20*l.*, and the whole amount recovered in the action

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WILSON v. STATHAM.

THE COURT (Day and Lawrance, JJ.) held that the allowances were wrongly made, and allowed the appeal.

Appeal allowed.

Solicitors for plaintiffs: *Chester & Co., for Brett, Barclay, & Hamilton, Manchester.*

Solicitors for defendant: *Indermaur & Brown, for Gardner & Son, Manchester.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.

June 8.

THE QUEEN *v.* COUNTY COURT JUDGE OF HALIFAX AND ANOTHER.

County Court—Jurisdiction—Title to a Franchise—Infringement of Patent—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57)—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 56.

A plaint in a county court claimed an injunction to restrain the infringement by the defendant of a patent right assigned to the plaintiff, and an account and damages. The defendant's solicitor gave notice that he intended to dispute the validity of the patent. The judge held that he had no jurisdiction to try the case. On an application for a mandamus to him to hear and determine the action:—

Held, that the effect of the Patents, Designs, and Trade Marks Act, 1883, was to prevent the county courts having jurisdiction in a proceeding for the infringement of a patent:

Held, also (affirming the judgment of the Queen's Bench Division), that the grant of letters patent for the use of a new invention is a franchise within the meaning of the proviso in s. 56 of the County Courts Act, 1888, so that a county court has no jurisdiction to try an action for the infringement of a patent where the validity of the patent is in dispute.

APPEAL from a judgment of the Queen's Bench Division, reported (1), discharging a rule calling upon the judge of the

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is less than 50*l.*, the practice is to tax the whole costs in the action, including the costs under Order XIV., according to the county court scale; and that this is done by making out a bill on the supposition that the whole action has proceeded in the county court, and so taxing it as to give the plaintiff as nearly as possible the same allowances as he would have had if the case had been tried in the county court. Where there is no exact equivalent in the county court scale for what has actually been done in the High Court, the nearest possible equivalent is given. Thus, the charges for a default summons in the county court scale are to some extent substituted for the charges in the High Court scale for proceedings under Order XIV.

(1) [1891] 1 Q. B. 793.

C A
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county court of Yorkshire, holden at Halifax, and P. Bairstow, the defendant in an action of *Sutcliffe* v. *Bairstow*, to shew cause why a writ of mandamus should not issue commanding the judge to hear and determine the action.

The plaint in the county court claimed an injunction to restrain the infringement by the defendant of a patent right assigned to the plaintiff, and an account and damages.

The defendant's solicitor gave notice that he intended to dispute the validity of the patent.

When the case came on for hearing in the county court, the judge, upon the objection of the defendant's counsel, held that he had no jurisdiction to try the action.

A rule for a mandamus was obtained, which was discharged on argument in the Queen's Bench Division. (1)

The plaintiff appealed.

Lewis Edmunds, (*R. A. Dale*, with him) in support of the appeal. The 56th section of the County Courts Act, 1888, gives the county court jurisdiction in all personal actions where the debt, demand, or damage claimed is not more than 50*l.*, and then follows a proviso excepting "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question." This action is a personal action, and it is not within the proviso. First, a patent for an invention is not a "franchise." Secondly, assuming that the term "franchise" could cover patents, it cannot be construed as doing so in this enactment. The other matters mentioned in the proviso all savour of realty; and the term "franchise" must be taken to mean a franchise which is an hereditament. A franchise must be a royal privilege—something that formed part of the royal prerogative—subsisting in the hands of a subject: Finch's Law, 164. Various lists of franchises are given in the old books and abridgments, and none of them mention patents for a monopoly. A monopoly is not a royal privilege which was exercised by the sovereign as part of his prerogative. The mode of questioning the right to a franchise is by quo warranto—a proceeding which is not applicable to

(1) [1891] 1 Q. B. 793.

patents. He cited on this point Britton, c. 20, Nichols' ed., vol. i. p. 75; Termes de la Ley, tit. Franchise; Jacob's Law Dictionary, tit. Franchise; Com. Dig., tit. Prerogative, D. 30, 31, 32; Chitty's Prerogative of the Crown, p. 119; Cruise Dig., tit. Franchises, 4th ed. vol. iii. p. 244. The Court below misinterpreted what was said by the Court in *Darcy* v. *Allen*. (1) It would appear that in many cases the charters given to corporations included the right to hold fairs and markets, and to exclude merchants who were strangers; the "charter of franchise," mentioned in the passage cited from *Darcy* v. *Allen* (1) by the Court below, refers to such charters of corporations, and no inference arises from that expression so used that the term "franchise" would be applicable to a mere charter of monopoly. The privilege which a patent confers on the inventor is an incorporeal chattel, which the patent impresses with the character of personal estate: Hindmarsh, p. 233; and it is also called "an incorporeal kind of personal property" in Williams on Personal Property. The right to a patent can be, and frequently is, assigned by the sheriff. Such a property cannot properly be called a franchise within the County Courts Act, 1888. The Patents, Designs, and Trade Marks Act, 1883, does not expressly exclude the jurisdiction of the county court; and, if it does so by implication, it is governed by the Act of 1888. That Act contains powers to make rules as to particulars of breaches and the like, and no difficulty would arise in making rules applicable to the trial in a county court of an action for infringement of a patent.

T. Terrell, (*Malcolm Douglas*, with him), contrà. The Patents, Designs, and Trade Marks Act, 1883, was a consolidating Act, which dealt with the whole subject of patents, and provided machinery for actions or proceedings in Court for infringement or revocation of patents. The provisions on these matters are not applicable to a proceeding in the county court, and by s. 117 "the Court" is to mean the High Court. Such a general provision would only be repealed by express words in a subsequent Act. The County Courts Act, 1888, certainly does not repeal the Act of 1883, and there is nothing inconsistent with the

(1) 11 Rep. 84.

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limitation of actions for infringement of patents to the High Court. Further, if it were necessary to argue it, the term "franchise" in the excepting part of s. 56 of the County Courts Act, 1888, includes, as was held in the Court below, the grant of letters patent.

LORD ESHER, M.R. I agree with the judgment of the Court below for the reasons that they gave, and I am prepared to say that the term "franchise" in the County Court Act, 1888, includes a privilege granted by the Crown in respect of its prerogative, and that so a grant of a patent comes within the exception, and the power of the county court to try a case involving the title to a patent is ousted by it. Apart from this it is clear to my mind that the Patents, Designs, and Trade Marks Act, 1883, gives no power to the county court to try such a case. The court of the County Palatine is an exception which has been dealt with by statute. That court had the jurisdiction of the High Court of Chancery, and always claimed the jurisdiction which is now confirmed by statute. I do not see that the limitation by the Act of 1883 of the right to try such cases in the High Court has been affected by the County Courts Act, 1888. The judgment of the Court below is therefore right, and should be affirmed.

LOPES, L.J. In the second volume of Blackstone's Commentaries under the heading "franchises" I find "franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." This would remove any doubt that I had, whether the term franchise included a patent, and if the case had to be decided merely on the construction of the County Courts Act, 1888, I think the jurisdiction of the county court would be excluded. This view is strongly confirmed on looking at the Patents, Designs, and Trade Marks Act, 1883, which provides special machinery for the trial of patent actions, only applicable to a trial in the High Court, and by s. 117 interprets the expression Court as used in the Act to mean the High Court. I agree, therefore, that the judgment of the Court below should be affirmed.

KAY, L.J. I am of the same opinion, and for similar reasons. In the year 1883 an Act was passed which provided very fully how proceedings as to infringement of a patent shall be tried in court, which is defined to mean the High Court. No one would suggest that at that time a county court had jurisdiction to try the validity of a patent. In 1888, an Act was passed which provides for the trial by a county court of certain actions, and I incline to agree that the trial of title to a patent would be excluded on the ground that a patent is a franchise taking effect under the prerogative of the Crown, which makes the grant. Putting the two Acts together the matter seems to me beyond a doubt. The opposite conclusion would lead to this—that there was a repeal by the County Court Act of the provisions of the earlier Act as to all patent actions tried in a county court, and this without any mention whatever of the Act which was being repealed.

Appeal dismissed.

Solicitors for applicant: *Ford & Ford, for C. T. Rhodes, Halifax.*

Solicitors for county court judge and the defendant: *J. H. Bridgford, for W. H. Boocock, Halifax.*

A. M.

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April 9, 10, 15.

London—City of London Court—Jurisdiction—Defendant Employed in the City —London (City) Small Debts Extension Act, 1852 (15 & 16 *Vict. c.* LXXVII), *s.* 39—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 185.

The jurisdiction given to the City of London Court, by s. 39 of 15 & 16 Vict. c. LXXVII., over defendants who do not dwell or carry on business, but only "have employment" within the City, is not taken away by the County Courts Act, 1888.

APPLICATION for a writ of prohibition to the City of London Court.

The plaintiff brought an action against the defendant in the City of London Court to recover the sum of 38*l.* for money lent. The action came on for trial, and the objection was raised on behalf of the defendant that the Court had no jurisdiction to

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hear the action, inasmuch as no part of the cause of action arose within the City of London, and the defendant neither dwelt nor carried on business within the City. The learned judge, however, held that he had jurisdiction under the London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), s. 39 (1), as the defendant was employed within the City, and the jurisdiction conferred by that section was not taken away by the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 74 and 185. The hearing of the action was subsequently adjourned, and the defendant applied to Pollock, B., in chambers, for a writ of prohibition, when the matter was referred to the Court.

C. C. Scott, for the defendant. The provisions of s. 39 of the Act of 1852, at any rate so far as they confer jurisdiction in cases where a defendant is employed within the City, are impliedly repealed by the County Courts Act, 1888. The latter Act placed the City of London Court on the same footing as the county courts; s. 186 includes the City of London Court in the definition of county court; s. 74 confers upon county courts their jurisdiction, and does not confer jurisdiction where a defendant is only employed within the district of the court; s. 185 provides that the judge and officers of the City of London Court shall have "the like jurisdiction, power, and authority in all respects," as the judge and officers of a county court, and that the rules, orders and forms in force in the county courts shall be in force in the City of London Court, to the exclusion of any other rules and orders. The words "the like jurisdiction" limit the jurisdiction of the City of London Court to that possessed by county courts, and to that which is provided for by the rules, orders, and forms of the county courts. No plaint can be issued out of that court except such as is provided for by the county courts rules, orders, and forms. Those rules and forms do not

(1) Sect. 39 provides: "Such summons may issue provided the defendant or one of the defendants shall dwell or carry on business or have employment within the City of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business or shall have had employment therein at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein."

provide for any plaint to be issued against a defendant who is only employed within the district: County Court Rules, 1889, Order v., rr. 9, 10, Forms 8, 14, 15. In this case the summons is in fact a default summons, and these forms are not applicable, and there is no form which is applicable. The jurisdiction must be the same in the case of an ordinary summons as in the case of a default summons. The fact that five sections (ss. 118–122) of the Act of 1852 have been expressly repealed by the County Court Act, 1867 (30 & 31 Vict. c. 142), and that no other sections of that Act have been expressly repealed, is not inconsistent with the argument that other portions of the Act, relating to jurisdiction, have been repealed, for those five sections do not in any way relate to jurisdiction. This part of s. 39 of the Act of 1852, being quite inconsistent with the provisions of the County Court Act, 1888, must be taken to be repealed by implication. There are other sections (ss. 88, 89) of the 1852 Act which have not been expressly repealed, but must be taken to be repealed by implication, for they cannot be supposed to be now in operation. The proviso at the end of s. 185 of the Act of 1888, that "nothing in this Act shall take away, lessen, or diminish any of the powers, rights, or privileges of the judge of the said Court, or the authority of the mayor, &c. . . . in relation to the fees taken therein," does not refer at all to the jurisdiction of the Court, but only to such special privileges as are conferred by the Act of 1852. The case of *Blades* v. *Lawrence* (1) decided that, by the County Court Act, 1867, the City of London Court was for all purposes made a county court, and explains the reservation of all rights and privileges of the judge contained in that Act: s. 35. That decision applies to this case.

Sir R. Webster, A.G., and *Danckwerts*, for the judge, and for the plaintiff. The Act of 1888 was almost entirely a consolidating Act, and did not, except in a few easily distinguishable instances, make any alteration in the previous law. This special jurisdiction was expressly conferred upon the City of London Court by the Act of 1852, which was an amending Act extending the jurisdiction, and was preserved by all the subsequent County Courts Acts down to 1888. This application is an attempt

(1) Law Rep. 9 Q. B. 374.

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to cut down the jurisdiction expressly conferred by the private Act of 1852 by implication from the provisions of a general Act. The provisions of a general Act will never, by implication only, be construed as taking away jurisdiction expressly conferred by a private Act, unless such jurisdiction is absolutely inconsistent with the general provisions. The provisions of the Act of 1888 are not absolutely inconsistent with the continuance of this jurisdiction; but, on the contrary, this jurisdiction is expressly preserved by the proviso at the end of s. 185. Sect. 74 of the 1888 Act, relied upon by the defendant, is not in that part of the Act which deals with "Jurisdiction and Law," but is in the part headed, "Procedure and Trial." This section was not intended to, and does not, affect jurisdiction. Certain sections of the Act of 1852 have been expressly repealed, viz., ss. 118–122 relating to costs, where a suitor proceeds in the High Court when he might have proceeded in the City of London Court. Those sections were impliedly repealed by the County Courts Acts, yet the legislature repealed them expressly, thus shewing that when it intended to repeal any provisions of the Act of 1852 it did so expressly. The rules, orders, and forms of the county court only relate to procedure and practice, and cannot affect jurisdiction. Jurisdiction cannot be cut down by rules and orders. If the existing forms of the county court are not applicable to this special jurisdiction of the City of London Court, Order LI., r. 24, provides that "in cases where no forms are provided the parties shall frame the proceedings or documents, using as guides those contained in the appendix." By the Act of 1852, s. 22, the fees of the Court are appropriated in a particular manner; and, if the applicant's argument is correct, there would be fewer plaints, and the fees would be lessened, and the privileges of the Court would be affected contrary to the proviso to s. 185 of the County Courts Act, 1888. In the case of *Blades* v. *Lawrence* (1), relied on by the applicant, the real point decided was that a particular mode of appeal was not a personal privilege of the judge of the City of London Court, and was not preserved. That has nothing to do with this case.

Scott, in reply.

Cur. adv. vult.

(1) Law Rep. 9 Q. B. 374.

1891. April 15. A. L. SMITH, J. This is an application by the defendant for a writ of prohibition directed to the plaintiff and the judge of the City of London Court to prohibit further proceedings in this action, which was being prosecuted by means of that which is technically known as a default summons, upon the ground that, inasmuch as the defendant did not dwell or carry on business within the city of London or the liberties thereof, but only had employment therein, the court had no jurisdiction to entertain the plaint.

In the year 1847, by the statute 10 & 11 Vict. c. lxxi., s. 40, jurisdiction was given to the court now called the City of London Court over defendants dwelling or carrying on business within the City or the liberties thereof. In the year 1852 this jurisdiction was expressly enlarged; and by s. 39 of the London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), it was enacted that "a summons upon plaint might issue from the court, provided that the defendants, or one of them, shall dwell or carry on business, or *have employment*, within the city of London or liberties thereof at the time of action brought, or provided that the defendants, or one of them, have dwelt or carried on business or shall have *had employment* therein at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein." It was surmised at the bar that the reason for this extension of jurisdiction was that at this time many persons had ceased as theretofore to reside within the City; and, as the court was supported by fees, the extended jurisdiction was given to keep up the efficiency of the court; but, be this as it may, this extended jurisdiction was then in fact expressly given by statute. The question for determination is, whether this extended jurisdiction has since been taken away—or, in other words, whether this section, which gives the extended jurisdiction, has been repealed in whole or in part? It is admitted on the part of the applicant that there has been no express repeal of this section; but it is argued that, by reason of the legislation which has since taken place, and especially by reason of the provisions of the County Courts Act, 1888 (51 & 52 Vict. c. 43), it has been repealed by implication. Now a repeal by implication is only effected when

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the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, "Leges posteriores contrarias abrogant" (1), applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together: *Thorpe* v. *Adams*. (2) Lord Coke, in *Gregory's Case* (3), lays it down, "that a later statute in the affirmative shall not take away a former Act, and eo potior if the former be particular and the latter be general"; and Lord Hardwicke, in the case of *Middleton* v. *Crofts* (4), is to the same effect. This being the law, it now becomes necessary to examine the legislation which has taken place since 1852, and especially and particularly the County Courts Equitable Jurisdiction Act of 1865 (5), the County Courts Amendment Act of 1867 (6), the County Courts Act of 1875 (7), and the last Act, relating to county courts, of 1888. (8) By the County Courts Equitable Jurisdiction Act, 1865, equitable jurisdiction was granted to the City of London Court, therein called the City Court, in the same way and to the same extent as it was therein given to the county courts. There is nothing in this Act, or the rules framed thereunder, in any way to suggest that the jurisdiction of the City Court was in any way altered or affected. By the County Courts Amendment Act, 1867, procedure by way of default summons was first given to both the county courts and the City Court (see s. 2), and its name was thereby altered to that of the "City of London Court." By s. 35 of this Act it was enacted that "the rules and orders in force for the time being for regulating the practice of and costs in the county courts, and the forms of proceedings therein, shall be in force in the City of London Court, to the exclusion of any rules and orders now in force in that Court, and the same fees shall be

(1) 2 Inst. 685.
(2) Law Rep. 6 C. P. 125.
(3) 6 Rep. 19 b.
(4) 2 Atk. 675.
(5) 28 & 29 Vict. c. 99.
(6) 30 & 31 Vict. c. 142.
(7) 38 & 39 Vict. c. 50.
(8) 51 & 52 Vict. c. 43.

taken for proceedings in which jurisdiction is hereby given to the Court, as upon similar proceedings in the county courts, and such fees shall be applied in the same manner as the fees taken under the provisions of the Act of 1852: Provided that nothing in this Act, or in any of the Acts specified in schedule D, shall take away, lessen, or diminish any of the powers, rights, or privileges of the judge of the said court, or the authority of the mayor, aldermen, and commons of the city of London, in common council assembled, in relation to such court or to the judge or officers thereof, or to the fees taken therein, as such powers or authority existed previously to the passing of this Act." Here I find a recognition of the City of London Court, and, as it seems to me, of its jurisdiction as granted by the Act of 1852. There is nothing in the rules or forms inconsistent with such jurisdiction; but, what is more, I find that, by s. 33 of this Act of 1867, five of the sections of the Act of 1852—ss. 118-122 inclusive—are expressly repealed, leaving wholly untouched the 39th section, which gave the extended jurisdiction to the Court. There can, I apprehend, be no doubt that up to this date, at any rate, the City of London Court retained its extended jurisdiction unimpaired. The Act of 1875 further dealt with default summonses, and left the matters of jurisdiction untouched. I now come to the Act of 1888, and it was upon this that Mr. Scott mainly relied on behalf of his client, the applicant. He said that s. 185 was the section which now regulated the procedure of the City of London Court; that by this section it was provided that "the rules and orders in force for the time being for regulating the practice of and costs in county courts, and forms of proceedings therein shall be in force in the City of London Court, to the exclusion of any other rules and orders"; that s. 74 of this Act only applied to defendants dwelling or carrying on business within the jurisdiction of the county courts; and that the rules and forms, viz. Order v., r. 9, and Form 15, and rule 10 and Form 14, were only applicable to defendants dwelling or carrying on business within the jurisdiction, and were wholly inapplicable to a defendant who only had employment therein; and consequently, as by s. 185 these rules, to the exclusion of all others, were those now in force in the City of London Court, it must

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be taken that that Court had no longer any jurisdiction to proceed against a defendant who only had, or had had, employment within the city, and that that part of s. 39 of the Act of 1852, at any rate, which gave jurisdiction over defendants employed within the city, must be held, by implication, to be repealed. The answer of the attorney-general to this argument was conclusive. He first pointed out that s. 185 of the Act of 1888 was all but identical with s. 35 of the Act of 1867, where, as above stated, the jurisdiction was left untouched. He next pointed out that s. 185 of the Act of 1888 in terms recognised the Act of 1852 as existing, and not by way of repeal; that s. 74 of the Act of 1888 was in a part of the Act relating to "procedure and trial," and not to "jurisdiction"; that the Act of 1888 was a consolidating Act, repealing the County Courts Act from 1846 downwards, and re-enacting the material parts thereof; that the rules and forms drafted thereunder were drafted to fit the county courts of the kingdom in general, and not the special jurisdiction of the City of London Court; and last, but by no means least, he pointed out that such a point as the present was expressly met by rules 24 and 28 of Order 51, which, in my opinion, really concludes the matter. There is, in my judgment, no foundation for the suggestion that the jurisdiction granted by the Act of 1852 has been repealed by implication. Mr. Scott referred to the case of *Blades* v. *Lawrence* (1), as shewing that the City of London Court was now identical with the county courts as to jurisdiction. In my judgment it in no way touches the point now under discussion on the jurisdiction of the City of London Court, and all that case decided, or was intended to decide, was that the judge of that court was to be proceeded against by rule and not mandamus, because that was the procedure applicable to county courts, the City of London Court amongst the number, and that case is entirely beside the point of over what defendants the Court has jurisdiction. Mr. Danckwerts had also another point, which was this. By s. 22 of the Act of 1852, nineteen-fortieths of the fees are taken by the judge, nineteen-fortieths by the clerk, and two-fortieths by the bailiff, and in certain events the corporation of London would be

(1) Law Rep. 9 Q. B. 374.

entitled to them, having in that event to pay the judge and officers. If, said Mr. Danckwerts, the extended jurisdiction is taken away as the applicant now desires, the fees coming to the corporation would be diminished, and that would be a lessening or diminishing of the rights, privileges, or authority of the corporation, within the meaning of the proviso to s. 185, which are expressly preserved, and that, he argues, shews also that by the Act of 1888 it never was intended to curtail the jurisdiction granted by the Act of 1852. But whether this be so or not, in my judgment this application must be dismissed with costs.

GRANTHAM, J. In this case my judgment must be for the defendant in prohibition.

The plaintiff, who is the defendant in the original action, and against whom a default summons has been issued by the City of London Court asks us, through his counsel, to say that the jurisdiction, especially given to the City of London Court by the Act of 1852 to serve summonses issuing out of that court on defendants who have employment in the city, though they do not live or carry on business there, was withdrawn from that court by the County Courts Act of 1888. When asked by me to point out the section or portion of any section in that or any other Act taking away that jurisdiction, or in any way attending to its destruction, Mr. Scott admitted fairly enough that he was unable to do so; but he asks us to assume that exceptional jurisdiction distinctly given for a definite purpose, and to meet an exceptional state of circumstances, which still exists, was taken away (he will not even say intentionally taken away) by the legislature in the consolidating County Courts Act of 1888, because he cannot find amongst the forms given in the appendix to that Act, for use in county courts, any form which is drawn out in such a way as to exactly meet the case of a defendant against whom a default summons is issued who does not live or carry on business, but only has employment, within the city. He is, however, obliged to admit that, with regard to the ordinary summonses other than default summonses used under that Act, there is nothing in the forms to be found inconsistent with the continued existence of the jurisdiction. The effect of that would be, therefore, that

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if the defendant had been sued by an ordinary summons no suggestion could be made of loss of jurisdiction by the City of London Court; but as he is sued by a default summons we are to hold that that jurisdiction has been taken away by implication. It is admitted that the whole of the Act of 1852, with the exception of the 118th and following sections as to costs in actions for small sums recovered in the superior courts, is still in force, modified no doubt as to the position of the judge, and assimilated in its procedure in many ways to the county courts; but in no one single instance can it be shewn that this special jurisdiction has been curtailed, and as the existence of this special jurisdiction does not in any way clash with, and is not inconsistent with, the more limited jurisdiction of the county court, I am prepared to decide this case on the broad ground that you cannot take away jurisdiction from a court, given to it in distinct terms by Act of Parliament, only by inference or by implication to be gathered from passages in other subsequent Acts, unless the language of those Acts makes the continued existence of the jurisdiction absolutely inconsistent with the subsequent legislative enactments. There are several other reasons that might be given for our judgment, but as my learned brother has gone so fully into them I confine myself to the above short reason now given for my judgment.

Solicitors for defendant: *Judge & Priestley.*
Solicitor for the judge and plaintiff: *Crawford.*

W. A.

THE BISHOP OF BANGOR AND OTHERS v. PARRY.

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April 22.

Charity—Charity Lands—Charity Commissioners—Effect of Lease granted by Charitable Trustees for a period exceeding Twenty-One Years without the approval of the Charity Commissioners—Charitable Trusts Amendment Act, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

By the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed, or which may hereafter be passed, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board (i.e., the Charity Commissioners), any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years":—

Held, by Charles, J., that a lease granted by the trustees of a charity for more than twenty-one years, without the approval of the Charity Commissioners, in contravention of the provisions of this section, was not valid for a term of twenty-one years, but was absolutely void.

CASE tried in Middlesex, before Charles, J., without a jury.

The facts sufficiently appear in the judgment. The case raised the question of the effect of a lease for more than twenty-one years granted by charitable trustees, without the approval of the Charity Commissioners, contrary to s. 29 of the Charitable Trusts Amendment Act, 1855.

Kemp, Q.C. (with him *Malcolm Douglas*), for the plaintiffs, cited *President and Governor of Magdalen Hospital* v. *Knotts.* (1)

Bryn Roberts, for the defendant, cited that case; *Soprani* v. *Skurro* (2); *Andrew* v. *Pearce* (3); *Henty* v. *Wrey* (4); *Taylor* v. *Dulwich Hospital* (5); *Pollard* v. *Grenvill* (6); *Mouys* v. *Leake* (7); *Kerison* v. *Cole* (8); and *Attorney General* v. *Morgan.* (9)

CHARLES, J. The plaintiffs are trustees of Bishop Rowland's charity, a part of the property of which is Llyslew farm, in the

(1) 4 App. Cas. 324.
(2) Yelv. 18.
(3) 1 B. & P. (N. R.) 158.
(4) 19 Ch. D. 492.
(5) 1 P. Wms. 655.
(6) Cas. C. 10.
(7) 8 T. R. 411.
(8) 8 East, 231.
(9) 2 Russ. 306.

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parish of Llanidan, in Anglesey, and this action is brought by them to recover possession of the farm from the defendant, Mrs. Parry. The trustees say that she entered into an agreement with them for the occupation of the farm for a year from November 12, 1888, at the yearly rent of 220*l.*, that the term expired on November 12, 1889, and that she is therefore now a trespasser. The defence is that Mrs. Parry is not in possession under this agreement, but as administratrix of Mr. John Hughes, to whom a lease of the farm for forty-five years, from Lady Day, 1872, was granted by the trustees of the charity at that date.

It appears from the minutes of the trustees that on February 3, 1872, they resolved to grant Mr. John Hughes, who was then tenant of the farm at a rent of 220*l.*, a lease for forty-five years at the same rent, in consideration of permanent improvement made by him and an undertaking to make others, and that a lease professing to demise the farm to Mr. John Hughes for that term was executed on February 13. Shortly after the execution of the lease, it was discovered that the trustees had no power to grant a lease for such a term. Their advisers were apparently not aware of the provisions of s. 29 of the Charitable Trusts Amendment Act, 1855, which enacts that "it shall not be lawful for the trustees or persons acting in the administration of any charity . . . to grant . . . otherwise than with . . . the approval of the board (i.e., the Charity Commissioners) any lease for any term of years exceeding twenty-one years." In this case it was common ground that the Charity Commission refused their approval. The trustees, therefore, in granting this lease, committed an unlawful act. In her defence the defendant pleads alternatively that this lease "was and is a valid lease at least for the term of twenty-one years."

It was not, and it could not be argued, having regard to the language of the statute, that the lease was good for forty-five years, but it was contended on the defendant's behalf that it was good for twenty-one years. If so, she would be entitled to possession at the present time, for the lease would not expire till Lady Day, 1893. I am indebted to counsel for an elaborate argument on this point, and the conclusion at which I have arrived is that the lease is absolutely void. Cases were referred

to in which, where persons, possessing only a limited interest in land, have professed to grant in excess of that interest, it has been held that the grants, though bad as regards the excess, were good for so much as was within the competence of the grantors; but I do not consider these cases authorities in any way applicable to the present case. An analogy to it is, I think, to be found in the case of leases which are void under the provisions of s. 3 of stat. 13 Eliz. c. 10. An example is to be met with in the case of *President and Governors of Magdalen Hospital* v. *Knotts* (1) in the House of Lords. There a question arose as to the effect of a lease granted by a charitable corporation in contravention of that statute, which enacts that all such leases shall be "utterly void and of none effect to all intents, constructions, and purposes." It was argued that, notwithstanding the strong language of the statute, the lease was in fact only voidable; but the Lord Chancellor and the other learned lords held that the statute meant what it said, and that the lease was, therefore, utterly void and incapable of being supported for any purpose. The slight difference in the language of the two statutes does not, in my opinion, assist the defendant. The statute of Elizabeth enacts that the lease is to be "utterly void." This statute declares that it is contrary to law to grant the lease. In granting it, therefore, the trustees committed, as I have said, an unlawful act, and I cannot hold the lease good for any purpose.

As a matter of fact, I do not hold that Mr. Hughes ever occupied the farm in the capacity of a tenant for twenty-one years. I think the evidence shews that he occupied from 1872 till his death in 1886 as a tenant from year to year upon such of the terms of the document of 1872 as were applicable to a yearly tenancy. I also think that any interest which the defendant had in this yearly tenancy as administratrix was duly brought to an end upon November 12, 1888, the date of the agreement upon which the action is brought. The defence that the defendant is entitled to remain in possession till 1893, because though she accepted the agreement of November 12, 1888, she did so under a misapprehension of her rights and without consideration, in my opinion completely fails. The lease of 1872 was utterly void, its only

(1) 4 App. Cas. 324.

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Charles, J.

importance being that it indicated the terms on which Mr. Hughes was yearly tenant to the trustees.

There is a counter-claim based in part on a covenant for quiet enjoyment contained in the void lease of 1872; but I am clearly of opinion that it cannot be sustained. It would be strange, indeed, if, notwithstanding that the lease is itself unlawful and a void and worthless thing, covenants contained in it could be made available for the benefit of the lessee. The authorities cited fall far short of warranting this conclusion, which appears to me contrary to legal principle, and, I had almost said, repugnant to common sense. The covenant for quiet enjoyment falls with the lease. The other part of the counter-claim is a claim under the Agricultural Holdings Act, with regard to which I have no jurisdiction.

The action is not one which it was necessary to try in Middlesex. The defendant might have applied to change the venue to Wales. As she did not do so, the usual order will be made. There will be judgment for the plaintiffs for possession and mesne profits, and the costs of the claim and counter-claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Simpson & Co., for Hughes & Pritchard, Bangor.*

Solicitors for defendant: *Blozam, Ellison & Co., for Roberts & Cemlyn Jones, Bangor.*

H. D. W.

LAMB *v.* GREAT NORTHERN RAILWAY COMPANY.

1891
April 7.

Master and Servant—Wages, Contract for Deductions from—Truck Act, 1831 (1 *&* 2 *Wm.* 4, c. 37), *s.* 23—*Truck Amendment Act,* 1887 (50 *&* 51 *Vict.* c. 46), *s.* 6.

The Truck Act (1 & 2 Wm. 4, c. 37) s. 23, provides that an employer may supply to an artificer in his employ any medicine or medical attendance, and may make deduction from his wages in respect thereof, provided that it is made under a contract in writing signed by the artificer.

By the Truck Amendment Act (50 & 51 Vict. c. 46), s. 6, "No employer shall, directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman any terms as to the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid to the workman are or is to be expended. . ."

The plaintiff, a railway porter, on entering the service of the defendants signed an agreement, one of the conditions of which was that certain deductions should be made weekly from his pay as his contribution to a sick and funeral allowance fund; the fund was for the benefit of the defendants' servants, and was managed on their behalf by the defendants. Deductions were made weekly from the plaintiff's wages until he left the defendants' service, when he brought an action to recover the amount of the deductions as having been made in contravention of the provisions of the Truck Acts. During the period in respect of which the plaintiff sued, a larger sum had been paid out of the fund for medical attendance on the plaintiff and his wife than the total amount of his contributions which he sought to recover:—

Held, that s. 6 of the Truck Amendment Act, 1887, did not apply to written contracts excepted by s. 23 of the Truck Act, 1831, from the operation of that Act; that the deductions were therefore legally made, and that the plaintiff was not entitled to recover.

APPEAL from a decision of the judge of the Doncaster County Court.

The action was brought to recover 2*l.* 7*s.* 8*d.*, the amount of certain weekly deductions made from the wages of the plaintiff while in the service of the defendants, and alleged to have been illegally deducted contrary to the provisions of the Truck Acts, 1831 and 1887. The plaintiff was in the service of the defendants from August 24, 1876, to June, 1890, part of the time in the capacity of a goods guard and part of the time as a porter. On August 24, 1876, the plaintiff signed a "nomination paper," which contained the conditions under which he was admitted to the service of the defendant company; one of the conditions was as follows: "There will be deducted from the pay of every porter

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under all circumstances so long as he continues in the service of the company the following, being his contribution to the Great Northern Railway Sick and Funeral Allowance Fund, established for the benefit of the servants, and a copy of the rules under which the fund is administered will be supplied to him on joining. It is optional, however, for a candidate to join this Great Northern sick fund if he is a member of any other benefit society and entitled to receive therefrom when ill not less than 10*s.* a week as a man, and 3*s.* 6*d.* a week as a lad." The scale of deductions was then set out. The plaintiff was supplied with a copy of the rules of the sick fund, and deductions were made weekly from his wages in accordance with the scale until he left the defendants' service in June, 1890. He claimed in this action to be entitled to recover the amount of deductions made from his wages from September 16, 1887, on which day the Truck Act, 1887, came into operation, down to the date of his leaving the service. It was admitted that during that time an annual payment of eight shillings had been made to the medical officer on the plaintiff's behalf, and that a further sum of two guineas had been paid on his behalf for attendance on his wife during her confinement, and that the sum of such payments on his behalf exceeded the total amount of the deductions from his wages which he sought to recover. It further appeared that the directors of the railway company were the trustees of the sick fund, and that the only expense of management was the charge for stationery, the work of the fund being discharged by the clerical staff of the company without any charge to the contributors.

The learned county court judge held that the plaintiff was a person engaged in manual labour within the meaning of 38 & 39 Vict. c. 90, s. 10 (1), and was therefore, by virtue of s. 2 of 50 & 51 Vict. c. 46 (the Truck Amendment Act, 1887), within the protection of the Truck Acts; but further held that the

(1) In *Hunt* v. *Great Northern Railway Co.* ([1891] 1 Q. B. 601), it was held that the guard of a goods train was not a person engaged in manual labour within the meaning of this section, and was not, therefore, a person to whom the Truck Acts applied. In the present case the question whether the plaintiff came within s. 10 of the Employers and Workmen Act, 1875, was, as will be seen, not decided.

deductions being made in respect of medicine and medical attendance under an agreement in writing signed by the plaintiff were not illegal, but were exempted from the operation of the Acts by virtue of s. 23 of 1 & 2 Wm. 4, c. 37.

The plaintiff appealed.

Aspland, Q.C., and *Blake Odgers*, for the plaintiff. The policy of the Truck Acts is to insure that the whole of a workman's wages shall be paid to him in coin, and that any agreement or stipulation as to the way in which the wages, or any part of them, shall be spent is to be invalid. This agreement for deductions is within the mischief aimed at by s. 2 of the Truck Act, 1831; it contains a stipulation as to the manner in which part of the plaintiff's wages to become due shall be laid out or expended; for although it is an agreement for deductions, such an agreement must stand on the same footing as an agreement as to the manner of expending wages actually paid over to the man, and is illegal unless it can be brought within the operation of s. 23 (1): *Pillar* v. *Llynvi Coal and Iron Co.* (2) That section cannot apply to the present case, for the deductions have not been made wholly in respect of medicine or medical attendance on the plaintiff, but also in respect of funeral allowances, &c., the result of the society's operations as shewn by the accounts being that they have a very large balance of profit amounting to many thousands of pounds.

Further, s. 6 (3) of the Act of 1887, is an extension of the Act of 1831, and absolutely prohibits the employer from imposing

(1) By. s. 23 of 1 & 2 Wm. 4, c. 37: "Nothing herein contained shall extend or be construed to extend, to prevent any employer of any artificer . . . . from supplying or contracting to supply, to any such artificer, any medicine or medical attendance . . . .; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of . . . . any such medicine or medical attendance . . . .; provided always that such stoppage or deduction . . . . shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer."

(2) Law Rep. 4 C. P. 752.

(3) By 50 & 51 Vict. c. 46, s. 6: "No employer shall, directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman any terms as to the place at which, or the manner in which, or the person with whom, any wages or

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any conditions on a workman as to the manner in which any portion of his wages shall be expended; and it is not affected by s. 23 of the former Act.

[A. L. SMITH, J. How can that be, when it is expressly provided that the two Acts are to be read together?]

It is obviously the meaning of the legislature, for at the end of s. 5 of the Act of 1887, which makes illegal deductions from wages in respect of orders for goods there is a proviso that nothing in that section is to apply to anything excepted by s. 23 of the principal Act, but there is no such proviso in s. 6.

[They also cited *Cutts* v. *Ward* (1); *Ex parte Cooper, In re Morris.* (2)]

Montague Lush, for the defendants, was not called on.

A. L. SMITH, J. I am of opinion that this appeal must be dismissed. The facts are simple. The plaintiff entered the service of the defendants on August 24, 1876, and remained until June, 1890, serving at first as a goods guard, and afterwards as a porter. He signed a document shewing the terms on which he was willing to serve, the material terms of which are that he was to receive sixteen to eighteen shillings a week according to the department in which he might be placed, and that he agreed to a deduction from his wages of certain contributions to the Great Northern Railway Company's Sick Fund, which had been established for the benefit of the company's servants, the contributions being in accordance with a schedule contained in the society's rules, a copy of which was supplied to the plaintiff. Deductions were made regularly up to September, 1887, when the Truck Act, 1887, came into operation; and between September, 1887, and June, 1890, when the plaintiff left the defendants' service, deductions amounting to 2*l.* 7*s.* 8*d.* were made from his wages; these deductions he claims to be entitled

portion of wages paid to the workman are or is to be expended, and no employer shall, by himself, or his agent, dismiss any workman from his employment for or on account of the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid by the employer to such workman are or is expended or fail to be expended."

(1) Law Rep. 2 Q. B. 357.

(2) 26 Ch. D. 693.

to recover. On the other hand, the defendants say that these deductions were not in contravention of the Truck Act, and further that they have between September, 1887, and June, 1890, paid on account of the plaintiff larger sums for medical attendance upon him and his wife than the amount he is seeking to recover, which has been found in their favour by the county court judge. It is admitted that the plaintiff cannot sue for deductions made before 1887, for he was not an artificer within the meaning of the old Truck Act; but the Act of 1887 brought within its operation workmen to whom the old Act did not apply, and it is suggested that the plaintiff is within it. That point has not been argued before us; it was unnecessary for our decision, and I therefore do not decide it.

The first question for our decision is whether this deduction is prohibited by the Truck Acts. I think that Mr. Aspland is right in saying that in ss. 2, 3 and 4 of the Act of Wm. 4, a drawback is prohibited per se, but that a deduction in respect of medicine and medical attendance is allowed under s. 23; the legislature seems undoubtedly to have started by making all drawbacks illegal, but there were some they did not wish to make illegal, and these they legalized by s. 23, including a deduction in respect of medicine and medical attendance. The effect of that section is that if there is a contract in writing as to such a drawback, it shall be permitted. That is the meaning of the old Truck Act. But it is said that in this case the deductions were for more than medicine or medical attendance, and that out of these deductions a fund called the Great Northern Railway Sick Fund has been created, which in the course of time has accumulated a considerable reserve. As to this, I need only say that the whole of the plaintiff's contributions, and more too, were paid to the doctors for medical attendance upon the plaintiff and his wife, and he cannot now turn round and attempt to take advantage of the old Truck Act and say that the deductions were unlawfully made, and make a claim for "wages actually earned and not paid to him by his employer" under s. 4.

Another point has been taken; that s. 6 of the Act of 1887 contains an absolute prohibition against imposing any conditions as to the manner in which the wages are to be paid; it is said

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A. L. Smith, J.

that that section goes further than the original Truck Act did. In my opinion what s. 6 did was to aim at coercion by the master of the men, and to say that the effect of such coercion is to render the contract illegal and void. But the question arises whether that section applies to contracts excepted by s. 23 of the old Act. Now the Act of 1887 is to be construed with the old Act, and in s. 5 there is an express provision that nothing in that section is to apply to anything excepted by s. 23. That proviso seems to me to be absolute surplusage, seeing that the two Acts are to be read together: I cannot see the good of a proviso that s. 23 of the old Act is to be read into that of 1887. If there were no such proviso, s. 23 would necessarily have to be read in at the end of s. 5 and also of s. 6, and that seems to me to be the proper reading of the two statutes; that s. 23 of the old Act is to be read in as a proviso at the end of ss. 5 and 6 of the new one. I am of opinion therefore that the county court judge was right. In my judgment the case of *Ex parte Cooper, In re Morris* (1) is inapplicable to the present case; there there was no contract in writing, and the master had kept the rebate in his pocket, and it was held that he could not have the benefit of s. 23, though he might have have had it had he paid the money away for his servant's benefit. I wish expressly therefore, to guard myself from the supposition that I am founding my judgment upon the decision in that case or any of the cases cited to us; I decide it upon the construction of the statute wholly apart from authority.

GRANTHAM, J. I am of the same opinion. Undoubtedly the decision in *Pillar* v. *Llynvi Coal and Iron Co.* (2) shews that this case would be within the Truck Act but for the exception from the operation of that Act of deductions in respect of medical attendance; and I agree that in framing the Act of 1887 the legislature started by bringing in the whole of the old Act, and then specially excepted certain things from its operation. I think too, that the language of s. 23 includes medicine and medical attendance for a man's wife and family, for ordinarily the man would be liable for it; it is medicine and medical

(1) 26 Ch. D. 693. (2) Law Rep. 4 C. P. 752.

attendance supplied to such artificer within the meaning of s. 23.

Coming to the Act of 1887, and to s. 5, no suggestion has been made to us why this section, which is almost a repetition of s. 5 of the old Act, should have been re-enacted; and I do not say that the explanation I am about to suggest is the only possible one. In that section the employer is not to be entitled "to a set-off or counterclaim" in respect of goods supplied to the workman, while the corresponding section of the Act of Will. 4 only prohibited his having "a set-off," and it is probable that the word "counterclaim" was expressly inserted by the legislature, because they thought that the old expression "set-off" might not prevent an ingenious lawyer from setting up a counterclaim under the present practice for goods supplied to the man, and the section was re-written for the express purpose of meeting that difficulty. As for the proviso at the end of the section, I can see no reason for its insertion, for without it s. 23 would have been incorporated.

Then comes s. 6, and although our attention has not been directed to the point, it is easy to see why it was passed. It was to supplement s. 2 of the old Act, from which it is very different; the former section refers to wages "due or to become due," while s. 6 of the Act of 1887 refers to wages "paid," and prohibits the master from imposing a condition as to the mode of their expenditure; this is clear from the rest of the section. The reason for the section was not that the legislature wished in it to interfere with what was done about wages due, but that they wished to prevent the employer from coercing the labourer after he had got the money into his hands. In my opinion s. 23 of the Act of Will. 4 overrides everything in this Act, and the present case is within the exception.

Judgment for respondents.
Leave to appeal refused.

Solicitors for plaintiff: *Thomas & Metcalfe, for Dunne, Doncaster.*

Solicitors for defendant: *Nelson, Barr & Nelson.*

W. J. B.

C. A.
1891
May 13.

[IN THE COURT OF APPEAL.]

VERNON AND OTHERS *v.* WATSON.

Friendly Society—Misappropriation of Property—Conviction under Statute—Imprisonment for Default in Payment—Conviction and Punishment a Bar to subsequent Action—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 16, *sub-s.* 9.

By s. 16, sub-s. 9, of the Friendly Societies Act, 1875, if any person, having property of a friendly society in his possession, withholds or misapplies the same, he shall be liable on summary conviction to a penalty not exceeding 20*l.* and costs, "and to be ordered to deliver up all such property, or to repay all moneys applied improperly, and in default of such delivery or repayment, or of the payment of such penalty and costs, to be imprisoned for any time not exceeding three months."

Where, under sub-s. 9, a penalty was imposed upon the respondent for misapplying the moneys of a friendly society, and an order to repay such moneys having been made against him, he was imprisoned for default in paying the penalty and repaying the moneys:—

Held (affirming the decision of the Queen's Bench Division), that the order to repay the moneys misapplied by the respondent, and the imprisonment, which was execution upon it, were a bar to an action subsequently brought by the society for the recovery of the same moneys.

APPEAL from a judgment of the Queen's Bench Division. (1)

The defendant, an officer of a friendly society, was charged under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16, sub-s. 9 (2), with the misappropriation of a sum of money

(1) [1891] 1 Q. B. 400.

(2) 38 & 39 Vict. c. 60, s. 16, sub-s. 9: "If any person obtains possession by false representation or imposition of any property of a society, or having the same in his possession, withholds or misapplies the same, or wilfully applies any part thereof to purposes other than those expressed or directed in the rules of the society and authorized by this Act, he shall, on the complaint of the society, or of any member authorized by the society, or the trustees or committee of management of the same, or by the central office, or of the chief registrar or any assistant registrar by his authority, be liable on summary conviction to a penalty not exceeding twenty pounds and costs, and to be ordered to deliver up all such property, or to repay all moneys applied improperly, and in default of such delivery or repayment, or of the payment of such penalty and costs aforesaid, to be imprisoned, with or without hard labour, for any time not exceeding three months; but nothing herein contained prevents any such person from being proceeded against by way of indictment, if not previously convicted of the same offence under the provisions of this Act."

belonging to the society, and was convicted, and ordered to repay the money, and to pay a penalty of 5*l.* and costs. He made default in complying with this order, and was imprisoned for a period of two months, with hard labour, and served the sentence. The plaintiffs, who were the trustees of the society, applied to the magistrates' clerk for a distress warrant to enable them to realize the amount due. The magistrates' clerk, being of opinion that the case came within 11 & 12 Vict. c. 43, s. 23, and that s. 19 of the same Act did not apply, refused the warrant. The plaintiffs then issued a specially indorsed writ, and applied for judgment under Order XIV. Leave to defend was given, and the case was ordered to be tried in the county court of Derbyshire, under s. 65 of the County Courts Act, 1888 (51 & 52 Vict. c. 43). The county court judge gave judgment for the plaintiffs, and the defendant appealed to the Queen's Bench Division, who reversed the county court judge's decision.

The plaintiffs appealed.

Hextall, for the appellants. It is submitted that the decision in *Knight* v. *Whitmore* (1), by which the learned judges in the Court below thought themselves bound, was wrong. The order made by the magistrates for the repayment of the moneys misapplied by the respondent was equivalent to a judgment upon which an action could be brought. The remedy given by s. 16, sub-s. 9, of the Friendly Societies Act, 1875, is cumulative, and the appellants are entitled to pursue both that remedy, and the remedy by civil action at common law, until they obtain satisfaction of the debt due to them. The imprisonment was not a satisfaction of the debt: *Reg.* v. *Hemsworth.* (2) At any rate the intention of the legislature to take away the right of action at common law is not expressed with sufficient clearness to enable that construction to be put upon the statute.

[He also referred to *Sinden* v. *Banks* (3), and *Vallance* v. *Falle.* (4)]

J. H. Etherington Smith, for the respondent, was not called upon to argue.

(1) 53 L. T. (N.S.) 233.
(2) 3 Q. B. 745.
(3) 3 E. & E. 623.
(4) 13 Q. B. D. 109.

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LORD HALSBURY, L.C. I am of opinion that this appeal should be dismissed. The legislature, for reasons sufficient to itself, has passed an Act of Parliament which gives a peculiar process in cases where the property of friendly societies is improperly withheld or misapplied. It has provided that proceedings—partly of a civil and partly of a criminal kind—shall be taken before magistrates. If the operation of the statute had been confined to criminal proceedings I should have entertained no doubt that imprisonment for the criminal offence afforded no answer to a civil claim for the debt. The old principle of law, founded upon public policy and expediency—that where a claim is founded upon a matter which might be the subject of criminal proceedings, the person seeking to enforce it must prosecute for the criminal offence before he can sue in a civil action—is not in question here. In the statute in question two different proceedings have been mixed together by the act of the legislature. First, there is a penalty imposed for wilfully withholding or misapplying the property of the society, and then there follows that which is strictly and properly a civil proceeding, namely, an order to deliver up the property or repay the money improperly withheld or misapplied, and if default be made in such delivery or repayment, or if default be made in payment of the penalty and costs, in either of those cases the statute prescribes a maximum amount of imprisonment, which is to be a satisfaction for the criminal offence and also for the non-payment of the civil debt and costs. We must apply the ordinary principles of law to each part of the procedure. In fact the legislation itself points in that direction, because one part of the section provides that the criminal proceedings taken under it shall not interfere with the right to indict, but there is no corresponding provision with respect to the civil part of the process. The result in the present case is that the respondent has been summoned for a civil debt; that he has been ordered to pay it, and that he has had execution against him in respect of it. It seems to me impossible to contend on the true construction of the statute that there has not been execution executed and a satisfaction of the debt. Under those circumstances, it is impossible to say that there is any power to sue

again for the same debt. I think that the decision of the Court below was right if it proceeded upon that ground. This appeal should be dismissed.

LORD ESHER, M.R. I think that all the cases specified in s. 16, sub-s. 9, were made criminal offences. Though some of them clearly were not criminal offences before the Act was passed, they are made so by sub-s. 9. They are, obtaining possession by false representation or imposition of any property of a society; withholding, which means wilfully withholding, or misapplying the same, or wilfully applying any part thereof to purposes other than those expressed or directed in the rules of the society. In each of these cases, the person doing the act specified is made liable on summary conviction to a penalty not exceeding 20*l.* and costs, "and to be ordered to deliver up all such property, or to repay all moneys applied improperly." I doubt whether the magistrates have any power, unless they inflict the penalty, to order the delivery up of the property, or the repayment of the money, because sub-s. 9 proceeds: "And in default of such delivery or repayment, or of the payment of such penalty and costs aforesaid, to be imprisoned, with or without hard labour, for any time not exceeding three months; but nothing herein contained prevents any such person from being proceeded against by way of indictment, if not previously convicted of the same offence under the provisions of this Act." I think that the legislature has treated all the things specified in sub-s. 9 as offences. The sentence, therefore, for misappropriating money belonging to the society is a sentence for an offence, but part of the sentence is that the money shall be repaid. The sentence, therefore, is an order for the repayment of the money found to be due. It is a judgment for the repayment of the money, and the person who has committed the offence is sent to prison for non-payment. The imprisonment is execution with regard to the money found to be due, as well as punishment for the criminal offence. You have, therefore, an order to repay the money; then execution by imprisonment, which is execution upon the person of the debtor. I doubt whether a distress warrant could be issued to enforce the order; but the Act

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provides a mode of execution by imprisonment. In my opinion sub-s. 9 does not oblige the society to proceed under its provisions. There is nothing to prevent them from bringing an action to recover the money misappropriated. In that sense the remedy given by the sub-section is cumulative; but it is more correct to call it an alternative remedy, because, if a party chooses to take the remedy provided by the statute, and gets an order for repayment under sub-s. 9, and execution upon that order, he cannot afterwards, according to ordinary principles, bring an action for the same debt. This appeal fails, and should be dismissed.

FRY, L.J. I also think that this appeal fails. I express no opinion upon some of the points dealt with by the Master of the Rolls in his judgment. Sub-s. 9 does two things: it inflicts a penalty, and enables the magistrates to make an order for delivery up of property or the repayment of money. Such an order is an order giving effect to civil rights. Then the sub-section couples together "such delivery or repayment" and "the payment of such penalty," and provides that, if default be made in doing both, the magistrates shall have power to send the person making the default to prison for a specified time. That, to my mind, is execution of the judgment for repayment of the money. It is execution of so much of the order as is of a civil nature. The two things, the civil and criminal procedure, are mixed and bound together in the sub-section. It follows that the imprisonment is a satisfaction, not only of the criminal, but of the civil remedy; and the plaintiffs having obtained satisfaction of their civil remedy, cannot afterwards bring another action.

Appeal dismissed.

Solicitors for appellants: *Warriner & Kinch, for Stone, Derby.*

Solicitor for respondent: *Fitz Payne, for Briggs & Clifford, Derby.*

W. A.

[IN THE COURT OF APPEAL.]

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April 16, 18; *May* 8.

ROCKETT *v.* CLIPPINGDALE.

Practice—Costs—County Court—Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 9—*Rules of the Supreme Court*, 1883, *Order* LXV., *r.* 1.

Sect. 9 of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that persons taking proceedings in a superior Court, which they might under s. 3 of that Act have taken in a county court, shall not be entitled to costs, unless the judge before whom the cause was tried shall certify that it was a proper cause to be tried in a superior Court, is inconsistent with and is repealed by Order LV., r. 1, of the Rules of the Supreme Court, 1875, and Order LXV., r. 1, of the Rules of the Supreme Court, 1883.

Tenant v. *Ellis* (6 Q. B. D. 46), approved.

APPEAL against an order of an official referee depriving the plaintiff of the costs of the action.

The action was brought in the Queen's Bench Division to recover 180*l.* damages alleged to have been caused to a schooner belonging to the plaintiff by a collision with a barge of the defendants, owing to the negligent navigation of the barge. The negligence was admitted, but the damage was denied, and 50*l.* was paid into Court in the alternative to cover any damage which might have been sustained. The action was referred for trial to an official referee, who awarded to the plaintiff 50*l.* beyond the 50*l.* originally paid into Court. It was then contended on behalf of the defendants that the action ought to have been brought in a county court, under s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, and that, as it had been improperly brought in the High Court, s. 9 of that Act operated to deprive the plaintiff of costs. The learned referee adopted this contention, and, on the ground that he had no jurisdiction to give costs to the plaintiff, refused him the costs of the action.

The plaintiff appealed to a Divisional Court.

April 16. *H. F. Boyd*, for the plaintiff. It is true that under s. 3 (1) of the County Courts Admiralty Jurisdiction Act, 1868,

(1) By s. 3 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), county courts having Admiralty jurisdiction have jurisdiction to try any cause in respect of damage by collision where the amount claimed does not exceed 300*l.*

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the action might have been brought in the county court, but s. 9 (1) does not operate to deprive the plaintiff of all right to costs. This is not an Admiralty cause within the meaning of those sections; it is an action for negligence at common law, and those sections apply only to Admiralty causes properly so called; they were never intended to apply to actions brought in the Queen's Bench Division to enforce a common law remedy. *The Asia* (2), which was cited to the official referee, was an Admiralty cause brought in the Admiralty Division, as are all the cases in which a plaintiff has been deprived of costs under this section. If, however, s. 9 ever did apply to a common law action brought in the Queen's Bench Division, it is inconsistent with and has been repealed by the Judicature Acts and rules: *Tenant* v. *Ellis* (3). Order LXV., r. 1, of the Rules of Supreme Court, 1883, provides that, "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge."

Edward Pollock, for the defendants. There has never been any express repeal of s. 9 of the Act of 1868, and it is clear from *The Asia* (2), *The Zeta* (4), and *The Herald* (5) that in the Admiralty Division it is treated as being still in force. It is true that in *Tenant* v. *Ellis* (3) a Divisional Court treated the section as being inferentially repealed, but that decision is in conflict with the later ones and should not be followed. If s. 9 is not repealed this case is clearly within it, for the plaintiff has taken in a "superior Court" proceedings which he might have taken in a county court.

Boyd, in reply. As to the implied repeal of s. 9, *Parsons* v.

(1) By s. 9, "If any person shall take in the High Court of Admiralty, or in any superior Court, proceedings which he might without agreement have taken in a county court . . . . and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that Admiralty cause is limited by this Act, ... he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court, of Admiralty, or of a superior Court before whom the cause is tried or heard, shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty or in a superior Court."

(2) [1891] P. 121.

(3) 6 Q. B. D. 46.

(4) [1891] P. 216.

(5) 63 L. T. (N.S.) 324.

Tinling (1), which was approved by the House of Lords in *Garnett* v. *Bradley* (2), is an express authority that Order LV., r. 1, of the rules of 1875 (for which rule 1 of Order LXV. of the Rules of the Supreme Court, 1883, is now substituted) operated to repeal all previous statutes as to costs, except such as were expressly preserved by s. 67 of the Judicature Act, 1873. If, however, s. 9 is still in force, the expression "superior Court" does not mean the High Court of Justice; it means a Court exercising a jurisdiction superior to that of the county court, such as the Court of Admiralty of the Cinque Ports, to which, by s. 33 of the Act of 1868, appellate jurisdiction is given.

Cur. adv. vult.

April 18. MATHEW, J. This is an appeal from the decision of an official referee, who considered that he was bound to deprive the plaintiff of the costs of an action brought by him in the High Court in respect of a collision in the river Thames. The plaintiffs paid 50*l.* into Court, whereupon the action was referred to an official referee, who found that the plaintiffs were entitled to an additional sum of 50*l.*; therefore in an action brought in the High Court and disposed of there the plaintiff has recovered 100*l.* damages, and in the ordinary course would have been entitled to the costs of the action. But it is said that under the County Courts Admiralty Jurisdiction Act, 1868, the action ought to have been brought as an Admiralty action in the county court, and that, as it has been brought in the High Court, the plaintiff is, under s. 9 of that statute, not entitled to any costs of the action. From the decision of the official referee depriving him of costs the plaintiff appeals on two grounds, on both of which he is, in my opinion, entitled to succeed: first, that the Act of 1868 never applied to such an action; secondly, that if it ever did apply to such an action, it has been repealed by the Judicature Act and rules.

Now, the Act of 1868 conferred a valuable jurisdiction on the county courts having Admiralty jurisdiction, giving them authority to try (inter alia) any claim for damage to cargo or damage by collision in which the amount claimed does not exceed 300*l.*,

(1) 2 C. P. D. 119. (2) 3 App. Cas. 944.

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and s. 9 provides that if any person takes in the High Court of Admiralty, or in any superior Court, proceedings which he might without agreement have taken in a county court, and recovers a sum not exceeding the amount to which the county court jurisdiction is limited, he shall not be entitled to costs. It is argued on behalf of the defendants that the expression "superior Court" in that section meant the Courts of common law in existence when the statute was passed, the Queen's Bench, Exchequer, and Common Pleas, and that the section therefore applied to an action brought in any of those Courts, and applies now to an action brought in the High Court. This argument, if it be correct, leads to astonishing consequences; in any action for damage by collision or damage to cargo where the amount claimed did not exceed 300*l.* the plaintiff would be deprived of his right of trial by jury, for under this statute the Courts are Admiralty Courts, consisting of a judge and assessors. Bearing in mind the precautions always taken for the preservation of the constitutional privilege of trial by jury, it seems inconceivable that the legislature could have intended such a result. What meaning, then, can we place upon the expression "superior Court"? The only reasonable construction, in my opinion, is that it means "any superior Court having Admiralty jurisdiction." There are certain local Courts which for certain purposes are superior to county courts, such as the Court of the Judge of the Cinque Ports, which may entertain appeals in Admiralty from the county courts within its jurisdiction, and this may be the explanation of the phraseology of the section. It is unnecessary to deal with the less complimentary solutions of the meaning of the expression suggested on the part of the plaintiff.

The second point is, in my opinion, equally clear. In the case of *Tenant* v. *Ellis* (1), which was an action for damage to cargo, the proposition was that the Act of 1868 no longer applied, and the conclusion of the Court was that as far as regarded costs the statute was repealed. Our attention has been called to the decision of Sir James Hannen in *The Asia* (2), where (though this is not quite clear) that learned judge appears to have thought that the statute was not repealed, and to have applied it to that

(1) 6 Q. B. D. 46. (2) [1891] P. 121.

case. But that action was purely an Admiralty action, brought in the High Court of Admiralty, when it might have been brought in the county court; it was not an action brought in the Queen's Bench Division. The recent case of *The Herald* (1) seems to point the other way, for there the statute was not treated as actually in existence, but was used as a guide to the exercise of the discretion of the Court. In my opinion *Tenant* v. *Ellis* (2) was rightly decided and must be followed; the plaintiff's contention, therefore, is right, and his appeal must be allowed. No cause has been shewn for depriving the plaintiff of his costs.

VAUGHAN WILLIAMS, J. I am of the same opinion on both points, and will only add a very few words. In my opinion the word "proceedings" in s. 9 of the Act of 1868 means proceedings in the nature of Admiralty causes, as to which there is no remedy at common law. As to the expression "superior Court" in s. 9, upon looking at s. 33 it becomes plain that the Court of Admiralty of the Cinque Ports is treated for the purposes of this Act as a superior Court; therefore the expression "superior Court" in s. 9 does not mean merely this Court, the High Court, because the Cinque Ports Court is contemplated as exercising appeal jurisdiction as a Court superior to the county court.

Appeal allowed.

W. J. B.

The defendants appealed to the Court of Appeal.

Finlay, Q.C., and *Edward Pollock*, for the defendants.

Gorell Barnes, Q.C., and *H. F. Boyd*, for the plaintiff.

Edward Pollock, in reply.

The arguments were in substance a repetition of those addressed to the Divisional Court. The same cases were cited, and also *Hewitt* v. *Cory* (3), *Hasker* v. *Wood* (4), and *Reeve* v. *Gibson*. (5)

(1) 63 L. T. 324.
(2) 6 Q. B. D. 46.
(3) Law Rep. 5 Q. B. 418.
(4) 54 L. J. (Q.B.) 419.
(5) [1891] 1 Q. B. 652.

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LORD ESHER, M.R. This is an action in respect of a collision at sea. The case was not tried by a jury, because the ancient jurisdiction of the Lord High Admiral was formerly exercised by the Ecclesiastical Court, in which juries were unknown. This was an anomaly, but we have to deal with things as they are. The only question is, whether we agree with the decision in *Tenant* v. *Ellis* (1), which is directly in point. The question is, whether the Judicature Acts and Rules have repealed by implication the provisions of s. 9 of the Act of 1868. *Tenant* v. *Ellis* (1) is not a decision which of itself binds this Court, but it professed to be decided in obedience to the decision of the House of Lords in *Garnett* v. *Bradley* (2), and we have to say whether we agree that *Garnett* v. *Bradley* (2) did decide the point. If it did, we are bound to obey it. Now, in *Garnett* v. *Bradley* (2) two classes of statutes were dealt with. The first class was that of statutes in which the subject of costs was treated of rigidly as regarded all suitors, and the House of Lords said that all such statutes had been impliedly repealed by Order LV. of the Rules of the Supreme Court of 1875, for which rule 1 of Order LXV. of the Rules of the Supreme Court, 1883, has since been substituted. The other class is that of statutes by which costs were given to a particular class of suitors, and the House of Lords decided that such statutes were not affected by Order LV. That is the rule which was laid down by the House of Lords. Under which class of statutes then does this Act of 1868 fall? It is not limited to any particular class of suitors; its provisions are general. If that be so, it is decided by the House of Lords that it has been repealed by rule 1 of Order LXV., and the plaintiff's costs must be dealt with under that rule. If the action is tried with a jury, the judge has a discretion to deprive a successful plaintiff of costs if "good cause" is shewn. If the action is tried without a jury, the judge has a discretion as to the costs without any particular "good cause" being shewn. Here the action was tried by an official referee, who, I will assume, stood in the same position as a judge without a jury. The referee thought that he was bound to deal with the costs in a certain way, and that he had no discretion in the matter, and

(1) 6 Q. B. D. 46. (2) 8 App. Cas. 944.

he did not, therefore, exercise any discretion. He in fact had a discretion, though he thought he had none, but it is impossible to say that he exercised his discretion. The Divisional Court adopted the usual course of doing that which the judge who had the discretion ought to have done, and they gave the plaintiff his costs. The only question is, whether we can overrule the discretion of the Divisional Court. I think we ought not to do so. The appeal must, therefore, be dismissed.

FRY, L.J. Two points have been taken. First, it is said that the official referee has exercised his discretion, and that there is no appeal from his decision. It seems to me clear that he did not exercise any discretion. He made particular reference to the Act of 1868, which he thought bound him to deprive the plaintiff of costs.

Secondly, it is said that s. 9 of the Act of 1868 is still in force. I think it is not. In my opinion, the case falls within the principle which is established by *Garnett* v. *Bradley*. (1) In that case the House of Lords drew a distinction between two classes of statutes, and they held that all general enactments as to costs are inconsistent with the general discretion which is given by the Judicature Acts and Rules, and therefore all such enactments have fallen, but that enactments which deal with the rights of a particular class of persons are unaffected by the general provisions of the rule. To use the words of Lord Blackburn (2), "where only general words are used there is a strong presumption that the legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to shew that." To which of the two classes of enactments does s. 9 of the Act of 1868 belong? It seems to me that it is a general enactment dealing with all litigants. But the decision in *Garnett* v. *Bradley* (1) is even again in point, because the Act 30 & 31 Vict. c 142, which was then in question, was another County Court Act; it was passed, as Lord Blackburn said (3), "for the purpose of discouraging persons suing in the Superior Courts instead of

(1) 3 App. Cas. 944. (2) 3 App. Cas. at p. 969.
(3) 3 App. Cas. at p. 963.

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suing in the county courts, and there is an enactment in general terms that where a party recovers less than a specified sum in tort he shall have no costs at all, unless some particular certificates are given," and the House of Lords held that that enactment had been repealed by Order LV. That Act was, therefore, in its scope and object, precisely similar to s. 9 of the Act of 1868. Both enactments were intended to encourage the bringing of actions for small amounts in the county court, and by the infliction of costs to discourage litigation in the Superior Courts. In my opinion the decision of the Divisional Court was quite right.

LORD ESHER, M.R. I may add that I do not think Lord Hannen intended to lay down the rule which is mentioned in *The Asia* (1) as a rule which is to bind any one.

Appeal dismissed.

Solicitors: *Keene, Marsland & Bryden; Thomas Cooper & Co.*

W. L. C.

June 4.

WALKER *v.* CRYSTAL PALACE DISTRICT GAS COMPANY.

Practice—Costs—Taxation—Counsel's Fees—Refreshers.

By Order LXV., r. 27 (48), where a cause is tried on vivâ voce evidence in open Court, "if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours have expired, the following fees. . ."

A trial extended over parts of two days, lasting altogether about five and a quarter hours; it occupied less than five hours on each day. Upon taxation of costs as between party and party, the master disallowed a refresher fee to the successful party's counsel in respect of the second day:—

Held, that a right to a refresher fee could only arise where the trial had lasted a "clear day" beyond the first five hours, whether "clear day" meant a separate day of the week, or only an additional period of five hours, and that therefore the master was right.

APPEAL of the plaintiff from the taxation of a master, by which a refresher to counsel was disallowed. The trial lasted

(1) [1891] P. 121.

from about 12.15 to 4.2 on Wednesday, and from 10.45 to 12.19 on Thursday; and it was contended that, the trial having lasted more than five hours, a refresher ought to be allowed to counsel upon taxation. (1)

Atherley Jones, for the plaintiff. The cases of *Harrison* v. *Wearing* (2) and *Brown* v. *Sewell* (3), though decided before the rules of 1883, are clear authorities as to what is the meaning of a "day"; it means the time of one day, though occupying parts of two days. Since the rule the question has been discussed in *Gibbs* v. *Barrow* (4) (a decision in chambers); *Collins* v. *Worley* (5); and *Wicksteed* v. *Biggs* (6); and the result of those authorities seems to be that "clear day" means a day clear from or subsequent to the day on which the five hours expired. The rule means that, if a case extends over more than one working day, and occupies on the first day of the week only, or partly on the first and partly on the second day of the week, more than five hours, then a refresher may be allowed for every working day subsequent to the first working day.

Danckwerts, for the defendants, was not called upon.

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DENMAN, J. It is impossible to get over the words "for every clear day," which have been obviously inserted for the purpose of preventing the very contention which has been made to-day. It is quite clear that the master, as between party and party, has no right to allow a refresher except under an Act of Parliament, or under rules which are equivalent to an Act of Parliament; he cannot allow one as a mere matter of discretion. Costs are the creation of statute, and the Court or the master is bound by the Act or rules laying down the cases in which particular costs are

(1) By Order LXV., r. 27 (48): "As to refresher fees, when any cause or matter is to be tried or heard upon vivâ voce evidence in open Court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees. . ."

(2) 11 Ch. D. 206.

(3) 16 Ch. D. 517.

(4) 30 Sol. Jo. 538.

(5) 60 L. T. 748.

(6) 52 L. T. 428.

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to be allowed. Order LXV., r. 27 (48), is the rule which gives the master his authority; and, looking at that rule with these considerations, we must see that it is so construed as not to bind unsuccessful parties to the payment of larger costs than those sanctioned by legislative enactment or rule. [The learned judge here read the rule.] The words "shall extend over more than one day," mean "shall begin on one and last into another day"; that is clear; the trial need not extend over one day of any particular length, but may go into more than one day. But then it is further requisite that either on one day, or else partly on the first and partly on the second day, the trial shall have lasted more than five hours without having been concluded, and then what follows as the result? The master may allow certain refreshers. What are they? He may allow certain fees for every clear day subsequent to that on which the five hours shall have expired, the necessary meaning of which I take to be that, when the five hours have expired, whether on the first or on the second day, and the case is not concluded, then after the expiration of another "clear day" a refresher may be allowed. It is unnecessary for us to decide whether such "clear day" may be accomplished by beginning at the end of the five hours made up on the second day, and going to another five hours made up on that or on the third day, or whether the expression "clear day" means an ordinary day of the week; for, whichever view is right, that has not happened in the present case which would entitle counsel to the allowance of a refresher; a "clear day" has not elapsed in either sense of the expression; the trial had only lasted about sixteen minutes beyond five hours, which is not a "clear day" in either view, nor anything like it. We are told that all the masters are of opinion that this is the proper meaning of the rule; and I see no way, giving its ordinary meaning to the language used in the rule, of holding that the master is wrong. The order must, therefore, be affirmed.

WILLS, J. I think that the master was perfectly right; it would be impossible to hold otherwise without violating the meaning of nearly every line and every expression in this long rule. The rule may in certain cases operate harshly, and it may

be right to allow a refresher in all cases where the limit of five hours has been exceeded; but it is not for us to say so, especially as there has been no argument on the other side. What the rule says is as plain as daylight. In my opinion the word "day" is used throughout the rule in the sense of a day in the week. For instance, if a case occupied on Monday more than five hours, on Tuesday there would be a right to a refresher; but if it took less than five hours on Monday, on Tuesday there would be no refresher, though if the case went into Wednesday we should get a "clear day"—clear of the other two, and subsequent to the Tuesday. In such a case it is unnecessary for us to say whether a part of Wednesday would be sufficient to entitle counsel to a refresher, or whether the whole of the five hours must be consumed on that day; but it is absolutely clear that, whatever may be the meaning of a "clear day," the day for which a refresher may be allowed must be a day after that on which the first five hours expire, and that the refresher cannot be allowed if less than five hours be occupied on the first day, unless the case runs into a third day. It is true that there are two so-called conflicting authorities; but of these, one was a decision at chambers, while the case before Chitty, J., is deprived of weight, because the cases decided before this rule was passed are treated as authorities; I think, however, that they have nothing to do with the question, and that the rule was passed because of those cases. It is obvious, too, that the only point to which the attention of Chitty, J., was called was whether the period of adjournment should be included in, or excluded from, the computation of the five hours. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Coburn & Young.*
Solicitors for defendants: *Wilkins, Blyth & Co.*

W. J. B.

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FECITT v. WALSH.

Adulteration—Milk in course of Delivery under a Contract of Sale—Delivery in Several Cans—Separate Informations in respect of Samples from more than one Can—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 9, 13—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

The appellant contracted to supply milk to a workhouse at a certain price; by the contract the milk was to contain a certain percentage of cream; it was to be tested on each delivery, and a reduction was to be made in the price in respect of any deficiency in cream. While the daily supply, contained in five cans, was being delivered at the workhouse the respondent, acting under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, procured a sample from each of the five cans; there being a large deficiency of cream in two of the samples the respondent subsequently laid two separate informations against the appellant in respect of those two samples under s. 9 of the Sale of Food and Drugs Act, 1875. The justices convicted the appellant in a separate penalty upon each information:—

Held, that the procuring of each sample was a separate transaction; that the appellant had committed a separate offence as to each can in respect of which an information was laid; that the separate informations were therefore properly laid, and the convictions were right.

Held, further, that the provisions in the contract as to deficiency of cream were immaterial in the determination of the question whether the appellant had committed an offence under the Act.

CASE stated by justices under 20 & 21 Vict. c. 43, from which, and from the documents forming part of it, the following facts appeared.

Two informations were preferred by the respondent against the appellant, under s. 9 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63) (1), severally charging that on

(1) By 38 & 39 Vict. c. 63, s. 9: "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

By s. 13 power is given to certain named officers to procure samples of food or drugs for the purpose of analysis.

By 42 & 43 Vict. c. 30, s. 3, certain officers therein named "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such officer, ... if he suspect the same to have been sold contrary

October 28, 1890, he was the consignor of certain milk which was being delivered at the workhouse at Walton to the West Derby Board of Guardians, being the purchasers or consignees, in pursuance of a contract for that purpose, and that the respondent being the inspector of weights and measures appointed by the local authority through his agent or assistant did procure at the place of delivery a sample of the milk, and suspecting that the milk had been sold contrary to law, did submit the same to be analyzed, when it was found (in respect of the sample taken in regard to which one of the informations was laid) that half of its cream and (in respect of the sample taken in regard to which the other information was laid) more than one-third of its cream had been abstracted, which affected injuriously its quality, substance, and nature, and that the same had been abstracted with intent that it should be sold in its altered state without notice, contrary, &c.

Upon the hearing of the informations it was proved that on the morning of October 28, 1890, a police sergeant went by direction of the respondent to the workhouse and there procured pursuant to s. 3 of the Sale of Food and Drugs Amendment Act, 1879, from the appellant's servant five samples of new milk from five different cans which were in course of delivery to the West Derby Board of Guardians under the appellant's contract with the guardians for the supply to them of a large quantity of milk, averaging about seventy gallons daily, which daily supply the appellant was in the habit of delivering every morning in one delivery. The samples were duly submitted to the public analyst, and his certificate in respect of two of the samples shewed that in the case of one one-half, and in the case of the other more than one-third, of the cream had been removed and the value had been deteriorated threepence per gallon below the value of the poorest fresh milk. The informations were laid in respect of these two samples.

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to any of the provisions of the principal Act, shall submit the same to be analysed,, and the same shall be analysed, and proceedings shall be taken, and penalties on conviction be enforced in like manner in all respects as if such officer .... had purchased the same from the seller or consignor under s. 13 of the principal Act.

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Under the contract with the guardians (which was to be taken as part of the case) the appellant was to supply pure new milk free from adulteration, at eightpence a gallon, yielding seven degrees of cream, and the contract contained the following clause, "Notice is hereby given that the milk will be tested on each delivery, and that should it fail to give the stipulated yield of cream, a deduction of one penny per gallon for every degree of cream short of six degrees will be made when the account is paid." The milk delivered by the appellant to the guardians was regularly tested on delivery at the workhouse pursuant to the terms of the contract, and a record of the tests was entered in a book kept by the guardians for the purpose.

It was proved on the part of the prosecution that the average yield of cream in new milk from several cows was ten degrees, and that in one of the samples of the appellant's milk there were only between four and five degrees of cream, and in the other between five and six degrees, but it was admitted that, taking all the five samples together, the cream might be about six degrees.

It was contended on the part of the appellant that the milk being delivered to the guardians as aforesaid, though in five cans for convenience of transit, was all portion of the same delivery under one contract, and that only one offence (if any) could have been committed in respect thereof.

It was further contended that only one sample taken fairly from the whole of the milk should have been taken and analysed, and the appellant proposed to give evidence in support of his contention that had a sample been fairly taken of the whole of the milk, such sample would have shewn the requisite degrees of cream required by the said contract.

It was further contended on the part of the appellant that the guardians had by their contract anticipated and provided against the offences alleged: (*a*) By defining the quality of new milk to be supplied. (*b*) By making provision for the test of the milk of each delivery. (*c*) By taking power to make deduction from the contract price in accordance with the deficiency in cream from time to time, below the contract limit. (*d*) And by their general power of rejection of the goods if not

equal to the contract standard. And, therefore, assuming the milk to be deficient in cream, it could not be said to have been sold in its altered state without notice within the meaning of the Act.

The justices were of opinion that there might be a separate offence in respect of each sample of milk, inasmuch as each can contained the milk of several cows, and the contents differed in quality; also that evidence could be given only in respect of the two samples in respect of which informations had been laid, and they declined to receive the evidence tendered on the part of the appellant as to the quality of a sample taken from the whole of the milk, and being of opinion that the milk referred to in the two informations had been deprived of some portion of its cream with intent that it should be sold in its altered state without notice within the meaning of s. 9 of the Sale of Food and Drugs Act, 1875, notwithstanding the provisions of the contract with the guardians, convicted the defendant in a penalty of 10*l.* on each information.

The questions of law for the opinion of the Court were:—

(1.) Whether more than one information could be laid against the appellant.

(2.) Whether separate samples or one sample only of the whole bulk should have been taken.

(3.) Whether the appellant was entitled to give evidence in reference to the samples of milk so taken as aforesaid, not the subject of either of the said informations.

(4.) Whether having regard to the said contract, there was any offence within s. 9 of the Sale of Food and Drugs Act, 1875.

If the Court was of opinion that the convictions were legally and properly made, and the appellant was liable, the convictions were to stand; but if the Court was of opinion otherwise the informations were to be dismissed.

Shepherd Little, for the appellant. On the assumption that any offence was committed by the appellant, there was at any rate only one offence. It is true that the constable is to be deemed to have purchased the milk in course of delivery as though he had purchased it from the seller under s. 13 of the

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Act of 1875; but there was only one delivery, and therefore only one sale; it is quite immaterial whether the seventy gallons of milk in course of delivery was delivered in one can or in seventy. The second conviction was therefore bad, and should be quashed.

But no offence at all was committed. The contract provides for the very case of a deficiency in the quantity of cream, and is the best possible evidence that the purchaser had notice, and that disclosure was made of the alteration in the milk within the meaning of s. 9 of the Act of 1875.

Poland, Q.C. (*W. H. Cross*, with him), for the respondent. The provisions of the contract under which the appellant sold the milk to the workhouse authorities are immaterial to the question of whether a public offence, not a mere breach of contract, has been committed; they afford no evidence of any disclosure to the purchaser within the meaning of s. 9 of the Act of 1875. The language of s. 3 of the Act of 1879 is free from any doubt, and when that section is read together with s. 13 of the earlier Act, it is clear that the offence was complete as soon as the constable had purchased the milk. It was wholly unnecessary for the constable to take a single sample of the whole quantity in the five cans; nor could evidence be given of the results of the analysis of the samples from the cans in respect of which no information was laid. The separate informations were rightly laid, for there were two separate offences; the offence consisted in the abstraction of the cream from the milk, and there was not one abstraction from one body of milk and a pouring of what was left into two cans, but cream was abstracted from each can separately.

Shepherd Little, in reply.

DAY, J. The first question for our consideration is whether on the facts there can be more than one information against the appellant. The milk was in course of delivery to the union, being part of a large contract extending over a long period; and it was being delivered in five cans, that being a convenient form of delivery. As far as the guardians are concerned, I should be of opinion that each day's transaction—that is to say, the quantity

supplied or delivered on each day—was only one sale, a sale of a portion of the yearly supply which he had contracted to make; as between the appellant and the union I think there was only one sale, and that if the union had laid the information, only one information would have lain. But that is not the form which the prosecution takes. Acting under the provisions of the Acts of 1875 and 1879, a constable procured as there provided several samples of milk; in each case of procurement he acted as purchaser and the appellant as seller. Now s. 3 of the Act of 1879 provides that an officer of health, inspector, or constable "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk"; and the milk may then be analysed, and proceedings taken, if necessary. The course of procedure there laid down was followed in the present case, and the constable procured several samples of milk in course of delivery. As far as he was concerned there were five transactions; in respect of each of those transactions he might have proceeded under the statute and would then be deemed to have purchased in each case from the seller. It seems to me that the sergeant in procuring these samples must be deemed to have been the purchaser in each particular case, and that as he was the purchaser of five samples, the purchase of each one was a separate transaction, and that in respect of each of them an information would lie. As a matter of fact, the respondent only proceeded in respect of two of the samples, obtaining a separate conviction upon separate informations in respect of each of them, and our answer to the first question must be that he was right, and that more than one information could be laid against the appellant.

The second question, whether separate samples should have been taken of each can or only one sample of the whole bulk is based upon the contract between the appellant and the guardians, with which we have nothing to do. But it is perfectly clear to me that the officer was justified in taking separate samples from each can without reference to the contents of the other can.

As to the third question, whether the appellant was entitled to give evidence as to the other samples, it is perfectly clear

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that those samples had nothing to do with the present case; it did not matter whether they were open to objection or not.

The fourth question merely asks us whether having regard to the contract any offence had been committed; but as I have before said we have nothing to do here with the contract. I am clearly of opinion that the conviction must be affirmed.

LAWRANCE, J., concurred.

Judgment for the respondent.

Solicitor for the appellant: *Wm. Rudd, Liverpool.*

Solicitors for the respondent: *Ridsdale & Son, for F. C. Hulton, Preston.*

W. J. B.

April 15, 16; *May* 15.

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Ship—Charterparty—Bill of Lading—Liability of Owner of Chartered Ship—Principal and Agent—Master—Charterers' Shipping Agent Ashore.

The defendant, being the owner of a ship and registered as managing owner, chartered her for a period of four months to G. It was provided by the charterparty that the captain, officers, and crew (with the exception of the chief engineer) should be appointed and paid by the charterer, and they were in fact so appointed and paid. The charterparty reserved to the owner sufficient space for ship's officers, crew, tackle, and stores; and it was also thereby provided that the captain should be under the orders of the charterer, and that the charterer should indemnify the owner from all liability arising from the captain signing bills of lading. The plaintiffs shipped on board her certain bales of cotton under bills of lading, some of which were signed by the captain, and the rest by a firm of R. K. & Co., who acted as the charterer's agents at the port of shipment. Neither the captain nor R. K. & Co. had any authority to sign bills of lading on behalf of the defendant. This fact was, however, unknown to the plaintiffs, who had no knowledge that the ship was under charter, but shipped the cotton under the belief that the bills of lading were signed on behalf of and with the authority of the owner. At the time the bills of lading were signed the defendant knew who the captain was, and also who the charterer's shipping agents were, but he had no knowledge of the fact or circumstances of the shipment. The cotton having, during the currency of the charter, been lost at sea (as was alleged) by perils not excepted by the bills of lading, the plaintiffs sued the defendant for the loss:—

Held, by Charles, J., that the plaintiffs, in the absence of notice to the contrary, were entitled to assume that the persons signing the bills of lading had authority from the owner to sign them on his behalf, and that the

defendant was consequently under the circumstances responsible for the safe carriage of the goods; and that he was so as well in respect of the goods specified in the bills of lading signed by R. K. & Co., as in respect of those specified in the bills of lading signed by the captain.

TRIAL before Charles, J., without a jury.

On October 13, 1888, the defendant Furness purchased a steamship, which on the same day he agreed to resell to the defendants Gilchrest & Co., as agents for a proposed new company to be called the Mexican Gulf Steamship Company, for a sum of 13,500*l.*, of which 500*l.* was to be paid in cash, and the balance on the transfer of the ship after the expiration of a charterparty of even date, whereby Furness chartered her to the said proposed company for a period of four months. The charterparty was executed by Gilchrest & Co., as agents for the company. It was thereby provided: "That *C. Furness* agrees to let, and the *Mexican Gulf Steamship Company* agrees to hire the said steamship for *four* calendar months from the day of *October*, she being then placed at the disposal of the charterers *under English flag in London*, in such dock or at such wharf or place where she may safely be afloat as charterers may direct, she then being tight, staunch and strong, and every way fitted for the service, and with full complement of officers, seamen, engineers and firemen, for a vessel of her tonnage, to be employed in such lawful trades between ports in the United Kingdom, on the Continent, *and in the United States, West Indies and the Gulf of Mexico, and within the limits of ordinary Lloyds' warranties, but not Suez Canal*, as charterers or their agents shall direct on the following conditions:—That the *charterers* ~~owners~~ shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen and crew; *owner* shall pay for the insurance on the vessel; also maintain her in a thoroughly efficient state in hull and machinery for the service. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated. That the charterers shall pay for the use and hire of the said vessel at the rate of *750l.* per calendar month, commencing on the *19th* day of *October, or as soon after as steamer is transferred to Mr. Furness*

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and delivered to charterers, but not later than October 23, 1888, at and after the same rates for any part of a month; hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) *at a port in the United Kingdom.* Payment to be made in cash in advance monthly, and in default of such payment as herein specified the owners shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they the owners may have on the charterers in pursuance of this charter. That the cargo or cargoes shall be laden or discharged in any dock, or at any wharf or place that the charterers may direct where she can always safely lie afloat. That the whole reach, burthen, and passage accommodation of the ship (not being more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, and stores. That the captain shall prosecute his voyage with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. That the captain ~~although appointed by the owner~~ shall be under the orders and directions of the charterers as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or in otherwise complying with the same. *Owner has the option of appointing chief engineer to be paid by the charterers.* That if the charterers shall have reason to be dissatisfied with the conduct of the ~~captain, officers, or~~ engineers, the owners shall upon receiving particulars of the complaint, investigate the same, and if necessary make a change in the appointment *when steamer in England.* That the master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages which are to be patent to charterers or their agents. That in the event of loss of time from deficiency of men or stores, breakdown of machinery or damage, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she may begin again in an efficient state to resume her service, but

should the vessel be driven into port of anchorage by stress of weather or from any accident to cargo, such detention or loss of time shall be at the charterers' risk and expense. That should the vessel be lost any freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to charterers. The Act of God, Queen's enemies, fire, restraint of princes, rulers and people, and all other damages and accidents of the seas, rivers, and navigation, throughout this charterparty always excepted. That the charterers *undertake at the expiration of* the charter to purchase the said vessel for the sum of *13,500l. per contract dated October 13, 1888.* That the owners shall have a lien upon all cargoes and all subfreights, for freight or charter money due under this charter; and charterers to have a lien on the ship for all monies paid in advance and not earned. All derelicts for benefit of charterers and owners mutually. Penalty for non-performance of this charter 2000*l.* as liquidated damages."

The portions of the charterparty which are in italics, were in ink, the rest was printed, and the erasures represent printed portions which were struck out in ink.

The captain, officers, and crew, with the exception of the chief engineer, were appointed by Gilchrest & Co., while Furness exercised his right under the charterparty, of appointing the chief engineer.

On October 30, Furness procured himself to be registered as "owner," and also as "managing owner," under the provisions of 39 & 40 Vict. c. 80.

The ship was sent to New Orleans by Gilchrest & Co., who appointed a firm of Ross, Keen & Co. to act as their shipping agents at that port. In December, the plaintiffs shipped on board her, for carriage from New Orleans to Bremen, 1200 bales of cotton under bills of lading, some of which were signed by the captain and the rest by Ross, Keen & Co. The bills of lading did not refer to the charterparty, nor did the plaintiffs know of its existence. In the bills of lading Ross, Keen & Co. were described as "agents," but it was not stated who their principals were. Neither the captain, nor Ross, Keen & Co. had any authority to sign bills of lading on behalf of Furness;

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but this fact was unknown to the plaintiffs, who shipped the cotton under the belief that the bills of lading were signed on behalf and with the authority of the owner. During the currency of the charterparty the cotton was lost at sea by reason (as was alleged) of the unseaworthiness of the ship; the plaintiffs sued Gilchrest & Co. as charterers and Furness as owner, for damages for the loss of the cotton. It was, however agreed, between the parties, that before trying the question of the cause of the loss, they should try the preliminary question whether, assuming that the goods were lost by the cause alleged, the defendant Furness and the defendants Gilchrest & Co., or either and which of them, were bound by the contracts contained in the bills of lading and were consequently responsible for the loss. An order having been made to that effect, this preliminary question came on for trial before Charles, J., without a jury. The defendant Furness, however, alone was represented.

Sir W. Phillimore and *Stubbs*, for the plaintiffs. The defendant Furness is responsible for the loss of the goods. He must be taken to have held out the captain as having his authority to sign bills of lading on his behalf. The plaintiffs had no notice that the ship was under charter, and intended to contract with the owner of the ship whoever he might be. Until the shipper has notice of the charterparty "he would be justified in supposing that in dealing with the master for the carriage of his goods he was dealing with the owner's agent. For primâ facie the master is the agent of the owner of the ship." Per Dr. Lushington: *The St. Cloud* (1). And *Sandeman* v. *Scurr* (2) is to the same effect. It may be that there is an exception in cases in which the charterparty amounts to a demise of the ship. But here there was no demise. Several of the stipulations in the charterparty are inconsistent with a demise. For instance, the provision that "captain shall be under the orders and directions of the charterers," was wholly unnecessary if he was to be their servant. See the *Omoa and Cleland Coal and Iron Co.* v. *Huntley* (3). The agreement by the charterers "to indemnify the owner from all liabilities that may arise from

(1) Br. & Lush. at p. 15. (2) Law Rep. 2 Q. B. 86.
(3) 2 C. P. D. 464.

the captain signing bills of lading," &c., shews that it was thought necessary to protect the owner. The provision that the captain and crew should be paid by the charterers is quite consistent with the intention that they should be the servants of the owner: *Fenton* v. *City of Dublin Steam Packet Co.* (1); *The Great Eastern*, (2) Again, the fact that Furness was registered as managing owner is very strong evidence that he intended to retain possession of the ship and not to demise it. See per Grove, J.: *Steel* v. *Lester*. (3)

With regard to the loss of the goods included in the bills of lading signed by Ross, Keen & Co., the owner is liable on the principle laid down in *Hayn* v. *Culliford*. (4) There it was provided by a charterparty that the owners should not be liable for the default of the master or crew. The plaintiffs, without notice of the charter shipped goods on board under a bill of lading, which did not relieve from responsibility for negligent stowage. The bill of lading was signed by the charterers as agents. The goods having been damaged by reason of negligent stowage, it was held that the owners were liable, on the grounds that either the goods were shipped under a contract, in which case it was the contract contained in the bill of lading, or else they were not, in which case the owners were liable for misfeasance. That dilemma applies equally here, for no distinction can be drawn between negligent stowage and stowage on board an unseaworthy ship.

Barnes, Q.C., and *Joseph Walton*, for the defendant Furness. The doctrine that the owner of a ship, in the absence of notice of the charterparty to the shipper, holds out the captain as having authority to sign bills of lading on his behalf, has no application except where the owner and captain stand in the relation of master and servant. In all the cases in which that doctrine has been applied, including *The St. Cloud* (5) and *Sandeman* v. *Scurr* (6), the captain was, in fact, the servant of the owner, appointed and liable to be dismissed by him. Where the captain has been appointed by the owner, and by the terms of the charterparty remains his servant, the owner, no doubt, is liable upon the bills of lading, but he is so, not because he is owner, but because he is the

(1) 8 Ad. & E. 835.
(2) Law Rep. 2 A. & E. 88.
(3) 3 C. P. D. at p. 127.
(4) 4 C. P. D. 182.
(5) Br. & Lush. 4.
(6) Law Rep. 2 Q. B. 86.

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captain's master. The liability arises not out of ownership, but out of agency; it being a general principle of the law of agency that a person who employs an agent cannot, as against third persons who deal with the agent under the belief that he has the usual authority of agents of that description, be heard to say that the agent's authority was, in fact, more limited. But here, the captain was not the servant of Furness. It seems clear from the charterparty that he was intended to be appointed, as he was in fact appointed, by the charterers. The reservation to the owner of the right to appoint the chief engineer necessarily implied that the charterers were to appoint all the other officers; and in the clause which provides that the captain shall be under the charterers' orders, the words "although appointed by the owners" are struck out. It was only due to a slip that the whole of that clause was not struck out; for it became unmeaning when applied to a captain who was appointed by the charterers. But even if the captain was, under the circumstances, the servant of the owner, and if, consequently, the owner was liable on the bills of lading signed by the captain, he cannot be liable on those signed by Ross, Keen & Co., for there can be no pretence of any agency between the owner and the charterers' agent ashore.

Stubbs, in reply.

May 15. CHARLES, J., delivered the following written judgment:—

In this action the plaintiff claimed damages from the defendants for the loss of 1200 bales of cotton, shipped by him on board the SS. *Sultan*, in December, 1888, at New Orleans, to be carried to Bremen, and there delivered to him. The ship was in the course of the voyage abandoned at sea, and the cargo lost. It was alleged by the plaintiff that the loss was attributable to the unseaworthiness of the ship; but a preliminary question was raised on the pleadings whether, assuming that the goods mentioned in the statement of claim were lost as therein alleged, the defendant, Christopher Furness, and the defendants, Messrs. Gilchrest & Co., or either or which of them, were liable for the alleged breach of duty and contract in respect of such loss. This question was on June 26, 1890, ordered to be tried before any of

the other questions in the cause, and it was accordingly heard before me on April 15. Messrs. Gilchrest & Co. were not represented on that occasion. The facts were as follows: Prior to October, 1888, the ship *Sultan* was a foreign ship called the *Asia*. On October 13, Mr. Furness bought her, and renamed her the *Sultan*, and on the same day agreed to resell her to Gilchrest & Co., for a company to be called the Mexican Gulf Steamship Company for 13,500*l.*, 500*l.* in cash, and the balance on transfer of the steamer after the expiration of a charterparty, also dated October 13. The parties to it were the defendant, Furness, described as "owner of the good screw steamship *Asia*," and the defendants, Gilchrest & Co., for a proposed new company, to be called the Mexican Gulf Steamship Company, who were described as "merchants and charterers." The following are its material provisions. [The learned Judge read the charterparty, as set out above.] This charterparty was partly in print and partly in writing, and in its printed shape provided for the appointment and payment of the captain by the owner, and not by the charterers. This circumstance was relied on, as shewing what the intention of the parties was, and it was further suggested that the indemnity clause, which was in print, had been allowed to remain in the altered document by mistake, and had ceased to have any significance when considered with the rest of the instrument. I do not think, however, that I am at liberty so to regard the clause. It is not inconsistent with the altered form, and must, in my opinion, have its due weight. In construing a charterparty, no greater effect can be given to writing than to print, although a different rule may prevail with reference to policies of insurance: *Alsager* v. *St. Katherine Docks Co.* (1) Gilchrest & Co. at once took possession of the ship, which had previously belonged to Spanish owners, and appointed the captain and crew, the owner, however, exercising his option of nominating the chief engineer. Under the terms of the agreement for sale, Furness received 500*l.* in cash, and the balance was, as thereby arranged, secured by a mortgage to them of the ship. Some repairs were done to her by Gilchrest & Co., and early in November she sailed for New Orleans. In the meantime, on October 30, Mr. Furness was

(1) 14 M. & W. 794.

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registered as owner, and his name and address as "managing owner," were registered under the provisions of 39 & 40 Vict. c. 80, s. 36, and the register certificate had been handed to Gilchrest & Co. by the brokers. On November 2, Furness wrote inquiring for the captain's name, which was given, and on November 30, he wrote thus to the captain, care of Ross, Keen & Co., shipbrokers, New Orleans: "You are doubtless aware that I am the registered owner of the SS. *Sultan*; but, according to contract entered into with Messrs. Gilchrest & Co., the vessel will be sold to that firm at an early date. The object of the present letter, however, is to ask you to see that during the time the vessel is my property my interests are protected in every way to the best of your ability, and I shall be glad to hear from you periodically as to your movements, and any further matters which you may think of interest to me. I rely on you, prior to leaving the States with your vessel, seeing that all accounts for disbursements, stores, coals, &c., prior to your leaving port, are settled and paid. This action will, no doubt, avoid any unnecessary correspondence after the vessel changes owners. If you will kindly advise me at your convenience quantity of cargo in each hold, quantity of bunkers on board, and draught of water on leaving this [sic] side, I shall esteem it a favour. The information is required for statistical purposes. Trusting that under your command the vessel will be in every way successful, and awaiting your reply in due course. I am, &c." It is also to be observed that on November 14, 1888, Mr. Furness insured the ship in the United Kingdom Mutual Steamship Assurance Association. In December, 1888, the plaintiff shipped the cotton, which was afterwards lost, on board the *Sultan*, under bills of lading, not referring to any charterparty, some of which were signed by the master and others by Ross, Keen & Co., for carriage to Bremen. Mr. Furness, however, knew nothing of the circumstances under which the goods had been shipped, or of the bills of lading signed by the master, and, so far as actual authority went, Ross, Keen & Co., acted as Gilchrest & Co.'s agents for shipment. All the bills of lading, as well those signed by the master as those signed in their own name, stated them to be "agents." The plaintiff had no knowledge or notice of the charterparty, or of the

relations which existed between Gilchrest & Co. and Furness. At the time of the loss it was agreed that the charterparty was still in force. Now, it could not be successfully contended that in this case that there was an actual demise of the ship, but it was said that the terms of the charterparty and the facts proved, indicated that the defendant, Furness, was not responsible. He was, however, the "registered owner," and the designated "managing owner," under 39 & 40 Vict. c. 80, s. 36, and at the time the bills of lading were signed knew who the captain was, and who the agents at New Orleans were. Primâ facie, therefore, he was bound by the signature of the master, and, indeed, also, under the circumstances, by the signature of the agents: *Hayn* v. *Culliford.* (1) The plaintiff had, as I have stated, no notice that any charterparty existed, nothing to warn him in any way that the captain had ceased to occupy his normal position, and had no authority to sign bills of lading for owners. It was pointed out that he and the rest of the crew were the charterers' servants, and so they were in one sense, for the charterers appointed and paid them all. But I have here to deal with a case where there had been no demise of the ship, and no notice to the shipper that the master's ordinary authority had been put an end to, and it seems to me that the cases of *The St. Cloud* (2) and *Sandeman* v. *Scurr* (3) apply. *The St. Cloud* (2) was a case of damage to cargo. The defendant pleaded that the vessel was under charter, and the plaintiffs replied that they had no notice of such charter. In dealing with this defence Dr. Lushington says, at p. 15: "When goods have been shipped in good condition on board a vessel, and by the misconduct or neglect of those in charge of her loss occurs, some one must be responsible. I apprehend that primâ facie the owner of the vessel is the person responsible, but the cases decided at common law shew that there are circumstances under which the owner will be divested of such responsibility, and that responsibility will be cast upon another. Such is the case of a vessel demised by charter to another, so as to divest the owner altogether of possession when the charterer is pro hac vice the owner: *Colvin* v. *Newberry.* (4) The present charterparty, I apprehend, to be clearly not one of this description. There is no

(1) 3 C. P. D. 410; 4 C. P. D. 182.
(2) Br. & Lush. 4.
(3) Law Rep. 2 Q. B. 86.
(4) 1 Cl. & F. 283.

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demise of the vessel. The owner, through his master, retains possession. There is a covenant to consign the vessel as the charter may designate. There is a reservation of the cabin and the deck, and for the goods shipped the charterer is to pay the owner certain rates of freight mentioned in the charterparty. This appears to me to be clearly distinguished from a charterparty demising and giving up possession of the vessel. It is contended, however, that the contract contained in the bill of lading was made by the master as agent of the charterers, and not as agent of the owner, and in support of this position is cited the case of *Schuster* v. *McKellar*. (1) But there is an important distinction in this case. The shipper is not proved to have had notice of the charterparty. Until he had such notice he would be justified in supposing that in dealing with the master for the carriage of his goods, he was dealing with the owner's agent. For primâ facie the master is the agent of the owner of the ship. I cannot think that it is consistent with justice or according to ordinary mercantile practice that a shipper of goods on board a ship put up in the usual way should lose his right to sue the owner for damage on account of a charter of this description of which he has no notice. I think the burthen of proof must fall upon the shipowner claiming exemption from liability; he must shew that the shipper had notice of the charter, and was aware that in making the contract the master was agent for the charterer." It is urged in the present case that the owner, through his master, did not retain possession; but in the sense in which Dr. Lushington uses the words, I think he did. Here, as there, there is a reservation of space for ship's officers, freight is to be paid at a certain rate, and the owner takes an indemnity against the master's acts for which he may be responsible. *Sandeman* v. *Scurr* (2) is to the same effect. Indeed, when the judgment is carefully examined, it appears exactly to cover the case before me. There the defendants were the owners of the *Village Belle*. She proceeded under charterparty to Oporto, consigned to charterers' agents. They put her up there as a general ship, and the plaintiffs delivered their goods on board, receiving bills of lading signed by the master in the usual form. They had no notice or knowledge of any

(1) 7 E. & B. 704. (2) Law Rep. 2 Q. B. 86.

charterparty, or that the ship was not entirely at the owner's disposition. The goods were damaged by improper stowage, and the owners were held responsible. "It is unnecessary to decide," says Cockburn, C.J. (at p. 95), "whether the charterer would or would not have been liable, if an action had under the circumstances been brought against him. Our judgment proceeds on a ground wholly irrespective of the question of the charterer's liability and not inconsistent with it, namely, that the plaintiffs having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give bills of lading on behalf of his owners, are entitled to look to his owners as responsible for the safe carriage of the goods. The result of the authorities from *Parish* v. *Crawford* (1) downwards, and more especially the case of *Newberry* v. *Colvin* (2), in which the judgment of the Court of Exchequer Chamber (3), reversing the judgment of the Court of Queen's Bench (4), was affirmed on appeal by the House of Lords, is to establish the position that in construing a charterparty with reference to the liability of the owners of the chartered ship it is necessary to look to the charterparty, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and as subsidiary thereto, to have the use of the vessel and the services of the master and crew. In the first case the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and, through the master and the crew who continue to be their servants, the possession of the ship also. If the master by the agreement of his owners and the charterer acquire authority

(1) 2 Str. 1251; Abbott on Shipping, 10th ed. p. 31.

(2) 1 Cl. & F. 283.

(3) 7 Bing. 190; 1 C. & J. 192.

(4) 8 B. & C. 166.

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to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners—in other words, he retains that relation to his owners out of which by the law merchant arises the authority to sign bills of lading by which the owner will be bound. It appears to us that the charterparty in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself, either express or implied. It amounts to no more than a grant to the charterer of the right to have his cargo brought home in the ship while the ship itself continues, through the master and crew, in the possession of the owners, the master and crew remaining their servants. It is on this ground that our judgment is founded. We think that so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well-known principle, that where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But in our judgment this altered shape of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that until the fact that the master's authority has been put an end to has been brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made." The learned Lord Chief Justice then proceeds to distinguish

Newberry v. *Colvin* (1), on the ground that in that case, where moreover there had been an absolute demise of the ship, the charterparty was known to the shippers, and thus the inference which would otherwise have arisen was negatived, that the master was held out by the owner as their agent.

The cases relied on for the defendant Furness, which will be found collected in Maclachlan on Shipping, 3rd ed., 342 to 350, undoubtedly shew that a charterparty, though not in form an absolute demise, may still be in such terms as to constitute the charterer the owner pro tempore of the ship, and to make the captain his servant and agent and his only, and this charter it was contended had that effect. But even assuming this contention to be correct—and, as I have remarked, the captain, being appointed and paid by the charterer, was in one sense his servant —no authority was cited for the proposition that the rights of a third person who ships goods on board, in ignorance of the charterparty, can be affected. On the contrary, it seems to me to be established by the cases I have referred to that the test of liability in such a case does not depend on the question of whether the master actually was the charterer's servant, but on the question whether he was held out to be the owner's servant. Here he certainly was so held out, and the "well-known principle" mentioned in *Sandeman* v. *Scurr* (2) therefore, in my opinion, applies. W. Furness, though he did not actually authorize the captain or agent, "allowed them to appear before the world" in a given capacity, and is liable to any one who contracted with such apparent agent "in a matter within the scope of such agency." I must in these circumstances decide the preliminary question raised against the defendant W. Furness, and find that he is liable to the plaintiff for the breach of duty and contract which it is alleged has been committed. The costs of the argument of this preliminary question will be costs in the cause.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Stokes, Saunders, & Stokes.*

Solicitors for the defendant Furness: *Crump & Son.*

(1) 7 Bing. 190; 1 Cl. & F. 283. (2) Law Rep. 2 Q. B. 86.

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IN RE POWELL. EX PARTE POWELL.

Bankruptcy—Non-compliance with Bankruptcy Notice—Act of Bankruptcy—Payment of Debt of Judgment Creditor—Petition by other Creditor on same Act of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*g*).

Where a debtor has committed an act of bankruptcy by non-compliance with a bankruptcy notice, under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (*g*), a bankruptcy petition may be presented by any creditor in respect of such act of bankruptcy, although the creditor who served the notice has, subsequently to the act of bankruptcy, received payment of his debt.

APPEAL from Swindon County Court.

Motion that a receiving order might be rescinded and the petition dismissed on the grounds (inter alia) that before the date of the presentation of the bankruptcy petition, the debtor had satisfied, by payment in full, the judgment debt in respect of which the bankruptcy notice in the petition referred to was issued; and that no act of bankruptcy had been committed by the debtor, upon which upon March 4, 1891, any creditor of the debtor was entitled to present a bankruptcy petition.

It appeared that Brown, Gould, & Co., judgment creditors of the debtor, had served him with a bankruptcy notice, and, as he did not comply with it within seven days, presented a petition in bankruptcy against him. On March 4, 1891, the respondents presented their petition against him founded on the same act of bankruptcy. On March 16, 1891, he satisfied the judgment debt of Brown, Gould, & Co., whose petition was on March 17, 1891, dismissed by their consent.

F. R. Y. Radcliffe, for the debtor. On the satisfaction of the judgment debt in respect of which the bankruptcy notice was given the act of bankruptcy arising from non-compliance with that notice was gone, and no adjudication could be made. In *Ex parte Wier, In re Wier* (1), a decision upon the earlier Bankruptcy Act, 1869, Mellish, J., delivering the judgment of the Court at p. 880, "When the debt is paid the act of bankruptcy committed at the expiration of the time mentioned in the debtors summons ceases to be an act of bankruptcy on which

(1) Law Rep. 6 Ch. 875.

the debtor can be adjudicated a bankrupt, and we think it, at the same time, ceases to be an act of bankruptcy to which the title of the trustee can relate back under the 11th section." The same principle still applies under the Act of 1883. No creditor could safely receive payment of his debt after giving such a notice and non-compliance within seven days, if another creditor could present a petition founded on that act. The second judgment creditor should serve a notice in respect of his own judgment debt.

F. Cooper Willis, for the respondents. Under the Bankruptcy Act of 1869, the only person who could avail himself of a debtor's summons was one who had issued it. But since the Act of 1883, 46 & 47 Vict. c. 52, s. 4 (*g*), when an act of bankruptcy has been committed by the failure of a debtor to comply with a bankruptcy summons any creditor may avail himself of it for the purpose of presenting a bankruptcy petition against the debtor: *Ex parte Dearle, In re Hastings.* (1) Under s. 43 the trustee's title relates back to the act of bankruptcy on which a receiving order is made, or, if there are more acts of bankruptcy than one, to the first of them committed within three months. The argument for the debtor would, if correct, deprive the creditors of the benefit of that provision. He cannot get rid of the act of bankruptcy by arrangement with the first creditor. The present Act enables one creditor to take advantage of the notice given by another.

CAVE, J. I am of opinion that the Bankruptcy Act of 1883 has made such a difference in the position of a debtor who has committed an act of bankruptcy by non-compliance with a bankruptcy notice, as to render the rule laid down in *Ex parte Wier, In re Wier* (2) inapplicable to the present case. Under the Act of 1883, the failure to comply with the requirements of a bankruptcy notice to pay a judgment debt is an act of bankruptcy of which any creditor may avail himself. Then why should that act of bankruptcy alone of all the acts of bankruptcy specified in s. 4, be capable of being put an end to by the debtor paying the creditor who issued the bankruptcy notice? When only the

(1) 14 Q. B. D. 184. (2) Law Rep. 6 Ch. 875.

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creditor who issued the debtor's summons could found a petition on it, there was no hardship in holding that he could not receive payment and yet reserve his right to make the debtor a bankrupt. But now, when any creditor may take advantage of the failure to comply with a bankruptcy notice given by another, the receipt of the debt by the creditor who gave the notice cannot lessen the right of another creditor to take advantage of the act of bankruptcy committed by non-compliance with the notice. The objection to the receiving order fails.

CHARLES, J. I am of the same opinion. I do not think that *Ex parte Wier, In re Wier* (1) applies to an act of bankruptcy committed under the Act of 1883. It has been held in a case arising on that Act, that where there has been an act of bankruptcy by failure to comply with a bankruptcy notice, any creditor may avail himself of it. That makes all the difference between such an act of bankruptcy now, and an act of bankruptcy under the Act of 1869 by neglect for three weeks after service of a debtor's summons to satisfy the debt.

Appeal dismissed.

Solicitor for appellant: *Frank Ridley.*
Solicitors for respondents: *Morten, Cutler, & Co.*

J. R.

C. A.

Feb 26; *March* 2, 5; *April* 27; *June* 9

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE SECRETARY OF STATE FOR WAR.

Army—Pay and Retiring Allowances—Royal Warrant—Secretary of State for War—Mandamus—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 136.

A mandamus will not lie against the Secretary of State for War to compel him to carry out the terms of a royal warrant regulating the pay and retiring allowances of the officers and soldiers of the army, inasmuch as no legal duty in relation to such officers and soldiers is imposed upon the Secretary of State either by statute or by common law.

ORDER nisi obtained on behalf of Colonel Edward Mitchell, a retired lieutenant-colonel of the Royal Engineers, calling upon the Secretary of State for War to shew cause why a writ of

(1) Law Rep. 6 Ch. 875.

mandamus should not issue to him commanding him to consider and determine, under the terms of a royal warrant issued in 1884, what was a just equivalent for any loss the applicant might have incurred by the operations of any royal warrants of a later date than July 4, 1872.

The following statement of facts is taken from the written judgment of the Court:—

Colonel Mitchell entered the army in August, 1855, and at that date received his first commission in the Royal Engineers. Under the then existing conditions of service he had an option of retiring on a pension of 600*l.* per annum after thirty years' service, provided there was a vacancy on the pension list, and he had become a colonel or major-general. He also had the right to continue to serve on full pay, as long as his health and conduct were satisfactory, till he reached the rank of major-general, and might have become a colonel-commandant at 990*l.* per annum. In 1863 he became captain, in 1873 major, and in 1882 lieutenant-colonel, his appointment to the last-mentioned rank dating from July, 1881. In 1881 a royal warrant was issued by which the term of service of an officer was limited by age; and removal to the half-pay list or retirement on a pension was made compulsory after five years' service as lieutenant-colonel. By royal warrant dated June 10, 1884, it was, amongst other things, provided in these terms: "Our will and pleasure is that from April 1, 1884, this our warrant for the pay and promotion and non-effective pay of our army shall be established and obeyed as the sole authority on the matters herein treated of, and that our principal Secretary of State for War shall be the sole administrator and interpreter of this our warrant." Article 80 provided that a lieutenant-colonel appointed to the Royal Engineers after September 30, 1877, should be placed on half-pay after five years' full-pay service. Article 86 (as amended by a subsequent warrant) permitted an officer below the rank of major-general to retire after twelve years' service with retired pay or gratuity according to article 972. Article 972 (as amended by a subsequent warrant) permitted a lieutenant-colonel in the Royal Engineers to retire with a retired pay of 450*l.* per annum after five years' service. Article 978, upon which the question to be

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decided by the Court turned, is in these terms: "An officer who held rank not below that of major in our Royal Engineers on September 30, 1877, and who shall retire from our army after having been removed from the regimental position of lieutenant-colonel under article 80, shall be granted such an addition to his retired pay, fixed by article 972, as our Secretary of State shall consider, on report of the Army Purchase Commissioners, a just equivalent with reference to any loss such officer may have incurred by the operation of any of our warrants of a later date than July, 1872. The principle on which such equivalent shall be calculated shall be determined with the concurrence of the Lords Commissioners of the Treasury."

This article 978 was identical in its terms with, and was a reproduction of, an article contained in a previous royal warrant, issued at a date prior to September 14, 1882. On that day, by a Treasury letter or minute, 600*l.* per annum was laid down as a limit of retired pay and compensation for loss of employment. This letter or minute was not expressly repeated after the issue of the royal warrant of June 10, 1884. On October 18, 1886, Colonel Mitchell received the following memorandum from the War Department: "As you will complete five years' service in the rank of regimental lieutenant-colonel on December 17, 1886, I have to inform you that, in accordance with the provisions of article 80 of the royal warrant of June 10, 1884, you will be removed from the corps and placed on half-pay list from that date inclusive. Should it, however, be your intention to retire from the service under the provisions of articles 86, 972, and 978, it may be advisable for your application to be sent in at an early date, otherwise you will lose the difference between half-pay and retired pay for the period between the several *Gazettes*."

To this memorandum Colonel Mitchell replied asking that he might be informed what extra pension in the shape of compensation he might expect to receive, and he received in reply a letter stating that he would be awarded compensation under article 978 of 150*l.* per annum, in addition to his retired pay of 450*l.* per annum. On November 5, Colonel Mitchell replied that he was willing to solicit permission to retire on December 17, 1886, on condition of receiving on that date 450*l.* a year pension

and the sum of 5,945*l.* compensation "in respect of calculations submitted in a separate letter." The separate letter contained calculations by an actuary based on materials supplied by the War Office, but the accuracy of the calculations was not altogether admitted, and it was suggested that they should be recast. The terms mentioned in his letter were not agreed to, and, as Colonel Mitchell did not accept the compensation offered of 150*l.* a year, that sum being in his judgment and estimation lower than would have been actuarially correct, he was, on December 17, 1886, pursuant to the warrant of 1884, placed on half-pay. On December 30, 1886, he wrote thus to the War Office:—"With reference to previous correspondence, and seeing no prospect of further employment, I ask leave to retire with the rank of major-general and a pension of 450*l.* per annum, leaving the question of the gratuity or annuity for compensation for loss of prospects in your hands for consideration." In reply, on January 10, 1887, Colonel Mitchell was informed that his retirement had been approved on retired pay of 450*l.*, with the honorary rank of major-general; and with reference to the question of compensation the War Department informed him that no case could be made out for an increase in the terms mentioned in the letter of November 5. "The amount decided on—viz., 150*l.* per annum—which was awarded in the usual way by the Army Purchase Commissioners on actuarial calculations approved by the Treasury, will therefore be at your disposal from the date of your retirement." The retirement of Colonel Mitchell was gazetted on January 19, 1887. After his retirement he caused further actuarial calculations to be made, according to which his loss by the operation of the royal warrants of a date later than July 4, 1872, was estimated at an annuity of upwards of 260*l.* A correspondence on the subject with the War Office ensued, and some personal interviews took place, and in the result Colonel Mitchell received this letter from the Under-Secretary of State for War, dated August 11, 1887:—"In reference to the claim which you brought before me personally at our interview on August 5, and to letters which you have since addressed to me, I have at your desire reconsidered the questions at issue and brought them before the Secretary of

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State. As regards the question of your retired pay and compensation for loss of employment, the sum of 600*l* per annum was laid down as a limit by Treasury letter of September 14, 1882, and it will be impossible for this decision, which was taken after very full consideration of the circumstances, to be reconsidered, as it has been acted upon without question since the date of this warrant."

Colonel Mitchell, on receipt of this letter, communicated with the Lords of the Treasury, and in answer received a letter written by Sir R. Welby on their behalf, dated August 23, 1887, stating that the province of the Treasury was restricted to concurring in the principle on which the just equivalent of the loss sustained by a retiring officer was to be calculated. The letter continued thus: "So long as the approved principle is adhered to, my Lords have no power to revise the addition awarded by the Secretary of State. My Lords do not understand you to assert that the principle approved of by the Treasury has been departed from in your case, but you object that the principle was determined before the date of the warrants under which you retired. I am, however, to explain that article 978 is a reproduction of a similar article in previous warrants under which the principle was determined by the Treasury. It could hardly be maintained that this department ought to re-determine the principle each time that the article is reprinted in a royal warrant. You appear to have received the maximum that can be awarded to an officer under similar circumstances, and my Lords are unable to hold out any prospect of an increased award."

Upon learning the decision of the War Office and Treasury, Colonel Mitchell presented a petition of right to Her Majesty, in which he asked for payment of the full amount of compensation for loss incurred by the operation of any warrants of later date than July 4, 1872. The Attorney-General demurred to this petition on the ground that it did not disclose any contract between Her Majesty and the suppliant, nor any engagement or service of the suppliant otherwise than at Her Majesty's pleasure, nor any right of the suppliant to any sum of money, emolument, or allowance, or any claim otherwise than on Her Majesty's

bounty. This demurrer was sustained on argument before Mathew, J., and in the Court of Appeal. Colonel Mitchell then applied for a mandamus to the Secretary of State for War to compel him to pay what he alleged to be a just equivalent for his loss by the operation of the royal warrants later in date than July 4, 1872, but that application was refused. He then obtained this rule.

Sir R. E. Webster, A.G. (*Henry Sutton*, with him), shewed cause. A mandamus will not lie to the Secretary of State for War to compel him to carry out the directions of a royal warrant; there is no analogy to the right to enforce by mandamus (where there is no other remedy) the provisions of a royal charter, for a charter is under the Great Seal, while a royal warrant is simply under the sign manual of the Sovereign and the Secretary of State. In carrying out the provisions of the warrant the Secretary of State is the mere agent of the Crown; he owes a duty to the Crown only, and is under no obligation to the officers and soldiers composing the force. The duty under the warrant is, in fact, performed by the Crown itself, and no writ of mandamus would lie to the Crown: none can therefore lie to the Secretary of State, who is its mere agent or delegate. The decision in *Ex parte Napier* (1) is directly in point, and really disposes of this case, and is supported by *Gidley* v. *Lord Palmerston.* (2) The case of *Rex* v. *Lords of the Treasury* (3), which is relied upon by the applicant, has been practically overruled in *Reg.* v. *Lords of the Treasury* (4), and actually overruled in *In re Nathan.* (5) The duty of the Secretary of State under the warrant is to make such allowance to each retiring officer as he thinks right; that is a duty to the Crown, and not to the officer, and this was the ground of the decisions in *Gidley* v. *Lord Palmerston* (2) and *Reg.* v. *Lords of the Treasury* (4), which cases were approved by Grove, J., in *Grant* v. *Secretary of State for India.* (6) There being no duty owed by the Secretary of State to the applicant, the latter has no legal right against him, and it

(1) 18 Q. B. 692.
(2) 3 B. & B. 275.
(3) 4 A. & E. 286.
(4) Law Rep. 7 Q. B. 387.
(5) 12 Q. B. D. 461.
(6) 2 C. P. D. 445.

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is clear from the judgment of Coleridge, J., in the *Baron de Bode's Case* (1) that a mandamus will only lie to enforce a legal right.

The position of officers and soldiers under a royal warrant was considered in *Kinloch* v. *Secretary of State for India* (2), where it was held that the defendant was merely the agent of the Sovereign to distribute a fund, and owed a duty to the Sovereign alone, and that therefore no mandamus would lie against him, even though the Court should be of opinion that he had not performed his duty; and it is impossible to draw a valid distinction between that case and the present.

There is no statutory duty imposed on the Secretary of State by s. 136 of the Army Act, 1881; that and the following sections merely control the action of the Paymaster-General, and point out the statutory deductions to be made from the pay; they leave wholly untouched the effect or authority of a royal warrant, and have nothing to do with deductions made under it.

[He also cited *Ex parte Ricketts.* (3)]

Lewis Edmunds, contrà. Even assuming that no statutory duty is owing to the applicant, a mandamus will lie to the Secretary of State to enforce the terms of the royal warrant, for a royal warrant regulating matters connected with the army is an act of the Crown done within the limits of the prerogative, and must be looked upon as analogous to a royal charter. There are many authorities to shew that the provisions of a royal charter are enforceable by mandamus (if there be no other remedy) at the instance of those for whose benefit the charter was granted.

In any view of the case the office of Secretary of State for War is a public office in respect of the duty owing by him to the applicant. The Secretary of State is not merely the servant of the Crown, in which case there could admittedly be no remedy by mandamus; there is an absolute duty cast upon him by virtue of his office to carry out the provisions of a royal warrant. It is immaterial that his duty is not a statutory duty; he is a public official, with duties laid down by the warrant; those duties are owed by him not merely to the Crown, but also to all the officers

(1) 6 Dowl. 776. (2) 15 Ch. D. 1; 7 App. Cas. 619.
(3) 4 A. & E. 999.

and soldiers coming under the operation of the royal warrant, and are therefore enforceable in the same way as though they had been created by statute. There is an enforceable legal duty imposed by the words "shall be obeyed" at the commencement of the warrant. The cases cited on the other side are distinguishable. In *Ex parte Napier* (1) the money was in the hands of the Crown at the time when the application was made for a mandamus, and the case amounted to an attempt to mandamus the Crown itself; the same was the case in the *Baron de Bode's Case.* (2) *Rex* v. *Lords of the Treasury* (3) is directly in point that a mandamus will lie; it is true that the case has since been overruled; but that was upon the facts, and did not affect the principle involved. In *Reg.* v. *Lords of the Treasury* (4) Blackburn, J., intimated that in a proper case the Lords of the Treasury would have been directed to make a minute, an act analogous to that which it is here sought to compel the Secretary of State to do.

The language of Lord Esher, M.R., in *Reg.* v. *Income Tax Commissioners* (5), is greatly in the applicant's favour. That case, he says, "falls within the class of cases where officials having a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so"; and the language of Lindley, L.J. (6), is to the same effect. The Commissioners of Woods and Forests have been held to be public officers invested with public duties which might affect the rights of private persons, and a mandamus to compel the peformance of a duty lies against them: *Reg.* v. *Commissioners of Woods and Forests.* (7)

The duty imposed on the Secretary for War is a statutory duty. By s. 136 of the Army Act, 1881, it is provided that "the pay of an officer or soldier of Her Majesty's regular forces shall be paid without any deduction other than the deductions authorized by this or any other Act, or by any royal warrant for the time being"; the royal warrant therefore has parliamentary authority, and is made the instrument for settling the amount

(1) 18 Q. B. 692.
(2) 6 Dowl. 776.
(3) 4 A. & E. 286.
(4) Law Rep. 7 Q. B. 387.
(5) 21 Q. B. D. 313, at p. 317.
(6) Page 322.
(7) 15 Q. B. 761.

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of pay, and the statutory duty of interpreting it is by this section cast upon the Secretary of State.

[He also cited *Reg.* v. *Powell* (1); *Reg.* v. *Lords of the Treasury* (2); *Armytage* v. *Wilkinson* (3); *Reg.* v. *Registrar of Joint Stock Companies.* (4)]

Cur. adv. vult.

April 27. The judgment of the Court (Cave and Charles, JJ.) was read by

CHARLES, J. (after stating the facts as above, the learned judge proceeded):—The first, and indeed in the view we take of the case the only question which we have to consider is whether, even assuming that the Secretary of State has not in fact considered and determined what was a just equivalent to Colonel Mitchell's loss, he can be compelled to do so by mandamus. The answer must depend upon whether there is imposed on the Secretary of State by the royal warrant any duty of a public nature in which the applicant is interested, or whether the duty imposed is one owing to the Sovereign alone.

Now there are no doubt cases where servants of the Crown have been constituted by statute agents to do particular acts, and in those cases a mandamus would lie against them as individuals designated to do those acts. But it is also beyond question that a mandamus cannot be directed to the Crown or to any servant of the Crown simply acting in his capacity of servant. "With reference to that jurisdiction," says Cockburn, C.J., in *Reg.* v. *Lords of the Treasury* (5), "we must start with this unquestionable principle—that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown. The thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

(1) 1 Q. B. 352.
(2) 16 Q. B. 357.
(3) 3 App. Cas. 355.
(4) 21 Q. B. D. 131.
(5) Law Rep. 7 Q. B. 387, at p. 394.

In the present case the Secretary of State is a servant of the Crown, and the duty we are asked to compel him to perform is not imposed by statute. It is true that the Army Act, 1881, s. 136, enacts that the pay of an officer or soldier of Her Majesty's regular forces shall be paid without any deduction other than the deductions authorized by that or any other Act or by any royal warrant; and s. 139 enacts that any authorized deduction may be remitted by royal warrant. But this mention of royal warrants does not give all their contents statutable force. They are now, as always, issued under the sign-manual of the Sovereign, and are in no sense a part of the statute law. But it is contended that a royal warrant regulating matters connected with the army is an act of the Crown done within the limits of the prerogative, and must be regarded as analogous to a royal charter. The position of the Secretary of State under this warrant was said to be similar, for example, to that of a corporation to whom a charter has been granted, conferring powers and privileges to be exercised for the benefit of certain classes of the community, and many authorities were quoted to prove the proposition that the provisions of a royal charter are enforceable by mandamus—where no other remedy exists—at the instance of those for whose benefit the charter has been granted; and a legal, though not a statutory, duty may doubtless in many cases be imposed by such a charter, which the grantee is bound to exercise—a duty, not to the Crown, but to the public, or to that section of the public which the charter is intended to benefit. It was also contended that a duty imposed by royal warrant on the Secretary of State for War in relation to officers or soldiers is really a common law duty, to the performance of which the officers and soldiers are legally entitled; and it is indisputable that duties imposed by common law are enforceable by mandamus. But after full consideration we have come to the conclusion that the royal warrant does not impose any such duty on the Secretary of State for War as is or may be imposed by statute, by charter, or by common law. It is issued, certainly, within the limits of the prerogative, and is therefore a lawful order. But it does not follow that it imposes any duty on him which an officer or soldier can enforce. His position in this

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respect appears to be exactly the same as that of the official formerly known as "Secretary at War," and the warrant imposes upon him no obligation beyond that which he owes to the Sovereign. A duty no doubt arises, but it is a duty between him and the Crown only. The applicant has no legal right to have it performed, and cannot, therefore, enforce its performance by mandamus. This appears to us to be clear upon principle; but that such is the position of the Secretary for War appears to be established authoritatively by the case of *Gidley* v. *Lord Palmerston.* (1) It was there held that an action would not lie against the Secretary at War by an individual for sums which as Secretary at War he was authorized to pay him, although he might have received the money applicable to that purpose. He had received the money, it was held, merely as the agent of the Crown, and was responsible to the Crown only for the due execution of the trust or duty committed to him. It is true that this was an action based upon an alleged contract between the plaintiff and defendant; but the reasoning of the judgment is equally applicable to an application for a mandamus, which must be founded upon some legal right in the applicant.

The same proposition was reiterated in *Ex parte Napier.* (2) In that case a mandamus was moved for on behalf of Sir Charles Napier to the East India Company to compel them to pay him a sum alleged to be due as arrears of pay. The application was based on certain statutes, which, it was contended, created a legal obligation towards Sir Charles Napier on the part of the company. They had made, it was said, unauthorized deductions from his pay. In discharging the rule Lord Campbell, C.J., said:—"The applicant must make out that there is a legal obligation on the East India Company to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established, for the existence of a legal right is the foundation of every writ of mandamus. . . . A legal obligation, which is the proper substratum of a mandamus, can only arise from common law, from statute, or from contract. Of course, the obligation here contended for cannot arise from the common law, and is not rested

(1) 3 B. & B. 275. (2) 18 Q. B. 692.

on contract. We have, therefore, to see whether there be any enactment of the legislature by which it can be supported. It was not contended that an officer in the Queen's army at home could apply to us for a mandamus on the ground that his pay is improperly withheld from him, and the application is entirely founded on certain statutes respecting the East India Company and the Government of the dominions belonging to the Crown in India." The Court then proceeded to examine the statutes, and decided that Sir Charles Napier's application must be refused.

Upon these grounds we think that there is in this case no power to grant a writ of mandamus. We can see no legal obligation on the Secretary of State towards the applicant, and in the language of the judgment just quoted a legal obligation must exist as the "proper substratum" of a mandamus. It is unnecessary to pronounce any opinion on the other points argued before us. The Attorney-General insisted that it was shewn on the affidavits that the Secretary of State had considered and determined what was a "just equivalent" for Colonel Mitchell's loss. On the other hand, Colonel Mitchell contended that a "just equivalent" had not been determined, as by a Treasury minute dated prior to the warrant of 1884 an inevitable maximum for his gratuity was fixed. Whether this contention is well founded or not we need not decide. Further, it was said by the Attorney-General that under the terms of the warrant the Secretary for War was its "sole administrator and interpreter," and, therefore, that even if he were wrong in considering himself bound by the Treasury minute, his discretion exercised honestly and bonâ fide could not be questioned. With regard to this point, we do not think it necessary to say more than that it appears to us, as at present advised, a formidable obstacle to the success of this application. Lastly, the Attorney-General contended that the applicant had not, in fact, established a primâ facie case of having been paid less than a "just equivalent" of his loss. Had this been the only answer made we should have thought the case a proper one for further investigation, and should have desired to have the facts more fully inquired into on the return of the writ. But as we regard the case as one

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in which we have no jurisdiction to grant the writ, we must discharge the rule with costs.

Order discharged.

W. J. B.

The applicant appealed.

June 9. *Lewis Edmunds*, for the applicant. [His argument was substantially to the same effect as in the Divisional Court. He cited 26 & 27 Vict. c. 12; The Army Act, 1881 (44 & 45 Vict. c. 58) ss. 136, 139; *Ex parte Blackmore* (1); *Rex* v. *Coleridge* (2); *Armytage* v. *Wilkinson* (3); *Ex parte Napier* (4); *Gidley* v. *Lord Palmerston* (5); *Kinloch* v. *Secretary of State for India* (6); *Reg.* v. *Lords of the Treasury* (7); *Reg.* v. *Special Commissioners of Income Tax* (8); *Reg.* v. *Lords of the Treasury* (9); *Reg.* v. *Powell* (10); *Rex* v. *Lords Commissioners of the Treasury* (11); *In re Nathan.* (12)]

Sir R. E. Webster, A.G., and *H. Sutton*, for the Secretary of State, were not called upon.

LORD ESHER, M.R. I entirely agree with the Divisional Court that a mandamus will not lie in this case against the Secretary of State for War, on the ground that there is no legal duty towards the applicant, to do what the applicant asks us to direct him to do, imposed upon him either at common law or by statute. Assuming that the Crown were under any obligation to make this allowance to the claimant, a mandamus would not lie against the Secretary of State, because his position is merely that of agent for the Crown, and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not: he has no legal duty as such agent towards any individual. But the case goes further than that. There is no obligation upon the Crown to make this allowance recognised by the law. Therefore, what we are asked to do is really to direct a servant

(1) 1 B. & Ad. 122.
(2) 2 B. & A. 806.
(3) 3 App. Cas. 355, 367.
(4) 18 Q. B. 692.
(5) 3 B. & B. 275.
(6) 15 Ch. D. 1; 7 App. Cas. 619.
(7) Law Rep. 7 Q. B. 387.
(8) 21 Q. B. D. 313, 317.
(9) 16 Q. B. 357.
(10) 1 Q. B. 352.
(11) 4 Ad. & E. 286.
(12) 12 Q. B. D. 461.

of the Crown, who is only responsible to the Crown, to do that which the Crown itself, his principal, is under no legal obligation to do. The appeal must fail on the grounds, first, that a mandamus would not lie against the Crown, and secondly, that it will not lie against the Secretary of State, because in his capacity as such he is only responsible to the Crown, and has no legal duty imposed upon him towards the subject. The principle has been laid down over and over again in many cases. For these reasons I think that the decision of the Court below must be affirmed.

KAY, L.J. I am of the same opinion. The application was for a mandamus to the Secretary of State to consider the matter, and in effect to make an addition to the applicant's retired pay under the royal warrant. The answer to that application appears to me to be that which the Master of the Rolls has given. A mandamus would not lie against the Crown, and the Secretary of State acting under this royal warrant is only acting as agent for the Crown. The case of *Kinloch* v. *Secretary of State for India* (1) was a stronger case than the present. There Her Majesty by royal warrant granted booty of war to the Secretary of State for India in trust to distribute among the officers and men of certain forces, and the plaintiff, an officer, who was one of those for whose benefit the fund was entrusted to the Secretary of State, took proceedings in Chancery, on behalf of himself and the other persons interested, to enforce the distribution of the fund. The case was determined against the plaintiff in the Court of Appeal. James, L.J., said (2): "The Secretary of State, whichever Secretary of State for the time being it is who has to deal with this matter, deals with it as the agent of the Crown, bound, no doubt, under his responsibility to Parliament, and the moral responsibility which the Crown itself has undertaken from once having made this intimation of bounty, but subject to accounting to the Sovereign, and subject to accounting to Parliament, in case there is any malfeasance or nonfeasance in the matter. It appears to me that it would be a violation of every principle for a municipal Court to take upon

(1) 15 Ch. D. 1; 7 App. Cas. 619. (2) 15 Ch. D. 1, at p. 9.

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itself to enforce the directions which the Sovereign has been minded to give to one of the great officers of state with regard to any particular portion of the Crown property, whether it is in India or in England." Baggallay, L.J., also said that there was no trust, but merely a direction to or an appointment of one of the officers of state to carry out Her Majesty's wishes in the matter. The case went to the House of Lords (1), where the decision was affirmed, Lord Blackburn saying that he rested his judgment on the short point, that on the construction of the warrant the Secretary of State was made an agent of the Queen, subject to Her Majesty's control and power, to pay away the moneys when quite satisfied that the claims were right, but he was by no means made a trustee subject to the power and control of the Court of Chancery. It appears to me plain that under this warrant the Secretary of State for War is only the agent of the Queen, and is responsible to the Queen, but is not subject to proceedings in any municipal Court at the instance of a person to whom he is directed by the warrant to make such an allowance as is here claimed, if he thinks him entitled to it. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for applicant: *E. J. Moeran.*
Solicitor for Secretary of State: *The Solicitor to the Treasury.*

(1) 7 App. Cas. 619.

E. L.

[IN THE COURT OF APPEAL.]

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Defamation—Slander—Privileged Communication—Privileged Occasion—Publication in discharge of Social or Moral Duty.

In an action for slander it appeared that the plaintiff was a valet, and while he and his master were staying at Newcastle as the guests of the defendant, who was a magistrate and the mayor of the town, the chief constable of Newcastle shewed the defendant a letter which he had received from the Edinburgh police, stating that the plaintiff was suspected of having committed a theft at a hotel in Edinburgh which he had recently left, and suggesting that a cautious inquiry should be made with the view of discovering whether the plaintiff was in possession of the property. The defendant did not make any inquiry, but just before the plaintiff and his master left Newcastle, he told the plaintiff's master privately that there had been a theft at the hotel, and that suspicion had fallen on the plaintiff; and some days afterwards the plaintiff's master dismissed him from his employment upon the ground that he had been suspected of dishonesty:—

Held, by Lindley and Kay, L.JJ. (Lopes, L.JJ., dissenting), that the occasion of the communication was privileged, and that, in the absence of evidence of malice, the defendant was not liable.

ACTION for slander.

At the trial before Wills, J., at the Leeds Summer Assizes, 1890, it appeared that on June 19, 1890, Mr. H. M. Stanley and the plaintiff, his valet, who had both been for some days in Edinburgh, where the plaintiff had lodged at the Waterloo Hotel, went to Newcastle-on-Tyne, where they stayed, until the next morning, at the Mansion House in that town, as the guests of the defendant, who was the Mayor of Newcastle, a magistrate, and the chairman of the Watch Committee. While Mr. Stanley and the plaintiff were staying at the Mansion House, the chief constable of Newcastle received from the chief constable of Edinburgh the following letter:—

"Criminal Investigation Department, Police
"Chambers, Edinburgh, June 19, 1890.
"Urgent.

"Sir—I am directed by the chief constable to acquaint you that between 5 and 11 P.M. yesterday a gold watch, &c., of which I annex description, was stolen from an unlocked drawer in a

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dressing-table of a bedroom in the Waterloo Hotel here. At this hotel a man 'Stewart' (Christian name supposed Roderick), who is at present valet to Mr. H. M. Stanley, the African explorer, was putting up, and from the fact of his having been observed in a bedroom, two doors from the one from which the property was stolen, occupied by a gentleman, and afterwards loitering in the passage near to the bedroom from which the property was abstracted, suspicion has been attached to him. The bedroom Stewart occupied was on the same floor, entering off the same passage. Nothing can be learned here regarding the character of Stewart, but it is understood he has only recently been employed by Mr. Stanley, who may know little or nothing of his antecedents. As you will readily observe, the groundwork of suspicion is very slender, and unless trace of the property to Stewart's possession was obtained, no action can be taken against him. The chief constable will be glad if you can see your way to have very careful and cautious inquiry made with the view of discovering whether Stewart is or has been in possession of the property. If it be traced to or found with him, arrest him and wire, when an officer will be sent for him. In the view that Stewart may be quite innocent, I am to urge that the inquiry should be so conducted as not to injure Stewart unless evidence of his guilt be obtained. Requesting immediate action, I beg to thank you in anticipation.

"I am, Sir, your obedient servant,

"W. M'EWEN, Dept. Insp.

"To the Chief Constable, Newcastle-upon-Tyne."

The chief constable of Newcastle shewed this letter to the defendant, who read it and returned it. The defendant did not make any inquiries, but just before Mr. Stanley left Newcastle told him privately that a lady's gold watch and chain had been stolen at the Waterloo Hotel, and that suspicion had fallen on the plaintiff. Some days afterwards, Mr. Stanley told the plaintiff what the defendant had told him, and dismissed the plaintiff from his service upon the ground that he could not keep in his service a person who had been suspected of dishonesty.

The learned judge directed the jury that the occasion of the communication made by the defendant to Mr. Stanley was not a

privileged occasion, and left to them only the question of damages. The jury found a verdict for the plaintiff with 250*l.* damages.

The defendant moved to have the verdict set aside, and a verdict entered for the defendant, upon the ground that the occasion of the communication in question was privileged, and that there was no evidence of malice; or, alternatively, if the Court were of opinion that there was evidence of malice, that a new trial should be directed on that issue.

Tindal Atkinson, Q.C., and *T. Willes Chitty*, for the defendant. There was no evidence whatever of malice on the part of the defendant, and the occasion on which he made the communication complained of to Mr. Stanley was a privileged one. There was no question which could properly be left to the jury, and the learned judge should have withdrawn the case from them, and directed judgment to be entered for the defendant. The defendant was the host of Mr. Stanley, and also a magistrate, and the mayor of the town, and the chairman of the Watch Committee. It was both his private and his public duty—social and moral, if not legal—to communicate to Mr. Stanley what he had learned from the chief constable of Newcastle; and there was, moreover, an interest both in the maker and the receiver of the communication. There are accordingly present in this case the essential elements of a privileged communication: *Coxhead* v. *Richards* (1); *Amann* v. *Damm* (2); *Harrison* v. *Bush* (3); *Clark* v. *Molyneux* (4); *Whiteley* v. *Adams* (5); *Davies* v. *Snead* (6); *Waller* v. *Loch* (7); *Pattison* v. *Jones.* (8)

Lockwood, Q.C., and *Robson*, for the plaintiff. The letter written by the superintendent at Edinburgh to the chief constable of Newcastle was a guarded letter, merely suggesting that cautious inquiry should be so made as not to injure the plaintiff. The terms in which it was written shew that it was never intended to be divulged. Mr. Stanley and the plaintiff had left the Mansion House before the defendant made the communication in question to Mr. Stanley; and, accepting the rule

(1) 2 C. B. 569.
(2) 8 C. B. (N.S.) 597.
(3) 5 E. & B. 344.
(4) 3 Q. B. D. 237.
(5) 15 C. B. (N.S.) 392, 418.
(6) Law Rep. 5 Q. B. 608, 611.
(7) 7 Q. B. D. 619.
(8) 8 B. & C. 578.

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laid down by Erle, C.J., in *Whiteley* v. *Adams* (1), the defendant had no interest in making any statement to Mr. Stanley as to what had occurred at Edinburgh before Mr. Stanley and the plaintiff came to Newcastle, and the statement was not made in the discharge of any duty, either legal, moral, or social. On the contrary, the defendant had made no inquiries, and his duty was not to injure the plaintiff unless evidence of his guilt had been obtained. The learned judge was right in directing the jury that the occasion was not a privileged one, and the verdict and the judgment ought to stand.

Tindal Atkinson, in reply. The dismissal of the plaintiff was not the natural consequence of the communication made by the defendant, and there is no right of action without special damage.

Cur. adv. vult.

LINDLEY, L.J. This is an action for slander. At the time when the slander was uttered the plaintiff was a valet in the employ of Mr. Stanley. Mr. Stanley was the guest of the defendant, who was the Mayor of Newcastle. The plaintiff was staying with his master at the Mansion House at Newcastle. They had come from Edinburgh, and were going on further visits. Whilst Stanley and the plaintiff were still at the Mansion House, at Newcastle, the chief constable of that town received from the chief constable of Edinburgh a letter to the effect that a lady who had been staying at the same hotel as the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The chief constable of Newcastle sent this letter to the defendant, who read it and returned it, and then told Stanley privately what I have above stated. This communication, which is the slander complained of, was made to Stanley just before he and the plaintiff left Newcastle; they were, in fact, just about to leave. Two or three days afterwards Stanley told the plaintiff what had been communicated to him, and discharged the plaintiff on the ground that he could not keep in his employ a person on whom any suspicion of dishonesty had fallen. This discharge, and the inability of the

(1) 15 C. B. (N.S.) 392, 418.

plaintiff to obtain a fresh situation, have occasioned loss to the plaintiff, and this loss is the special damage which he has sustained by reason of the slander complained of. The learned judge who tried the case told the jury that the communication made by the defendant to Stanley was not privileged, and the jury found a verdict for the plaintiff, damages 250*l*. The application to us is for a new trial, or that judgment may be given for the defendant, on the ground that the communication was privileged, and that there was no evidence to go to the jury of malice on the part of the defendant.

To determine this matter it is necessary to consider—first, whether the judge was right in telling the jury that the communication was not privileged; and, secondly, if the judge was wrong in this respect, whether there was or was not evidence of malice proper to be left to the jury, which would justify their verdict.

In order to answer the first question it is necessary to consider what is meant by a privileged communication. A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language. This is the effect, in a few words, of the leading cases on the subject—namely, *Toogood* v. *Spyring* (1); *Wright* v. *Woodgate* (2); *Coxhead* v. *Richards* (3); *Whiteley* v. *Adams* (4); and *Clark* v. *Molyneux*. (5) It is the duty of the judge to determine whether an occasion is privileged or not, and if it is, and if there is no evidence of malice to go to the jury, it is his duty to enter judgment for the defendant: see *Whiteley* v. *Adams* (4); *Clark* v. *Molyneux*. (6) On the other hand, if the occasion is not privileged, or if there is any evidence of malice (the meaning of which I will examine presently), then the case must be left to the jury. The law on this point has long been well settled, and was carefully explained in *Clark* v. *Molyneux*. (5)

(1) 1 C. M. & R. 181.
(2) 2 C. M. & R. 573.
(3) 2 C. B. 569.
(4) 15 C. B. (N.S.) 392, 418.
(5) 3 Q. B. D. 237.
(6) 3 Q. B. D. 246.

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What, then, are privileged occasions—what are the circumstances which must exist in order to rebut the implication of malice which arises from the utterance of untrue defamatory language? Without referring to such matters as reports of what occurs in Parliament, Courts of justice, or public meetings, which have no bearing on the present case, I can find no better answer to this question than that given by Parke, B., in *Toogood* v. *Spyring* (1), and by Erle, C.J., in *Whitcley* v. *Adams*. (2) In *Toogood* v. *Spyring* (1), Parke, B., in speaking of the publication of statements false in fact and injurious to the character of another, said (p. 193): "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." This passage has been frequently quoted, and always with approval.

The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not. *Coxhead* v. *Richards* (3), in which four very eminent judges were equally divided upon the question whether an occasion was privileged or not, is a striking illustration of the truth of this remark. In that case the mate of a ship wrote to the defendant, a friend of his, a letter reflecting on the character of the captain. The defendant, who was a stranger to the owner of the ship, shewed the letter to the owner; the owner dismissed the captain, who sued the defendant for libel. Tindal, C.J., and Erle, J., held the occasion privileged. Coltman and Cress-

(1) 1 C. M. & R. 181. (2) 15 C. B. (N.S.) 392, 418.
(3) 2 C. B. 569.

well, JJ., held that it was not. In *Amann* v. *Damm* (1), the late Willes, J., said he was fully prepared to go the whole length of the doctrine laid down by Tindal, C.J., and Erle, J., in *Coxhead* v. *Richards.* (2) Lord Blackburn also approved of it in *Davies* v. *Snead.* (3) Having carefully considered all the four judgments in that celebrated case (*Coxhead* v. *Richards* (2)), I have no hesitation in saying that the judgment of Tindal, C.J., is the one which carries conviction to my own mind, and is the one which I consider the most accurate and safe to take as a guide; nor am I aware of any subsequent case in which that judgment has been disapproved.

In *Whiteley* v. *Adams* (4), Erle, C.J., alludes to the difficulty of deciding questions of moral duty to which I am now addressing myself. It was an action for libel on two letters. On page 414 he said, "Each of these letters contains matter which is clearly defamatory of the plaintiff, and forms the foundation of an action, unless the circumstances under which it is written bring it within the protection afforded by the law to what are called privileged communications. I take it to be clear that the foundation for an action for defamation is malice. But defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again, lately, in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails. In the present case the jury found that the letters were written by the defendant bonâ fide and in the honest belief that what he wrote was true, and that it was his duty to make the communications he did. Do the circumstances show that the letters were written in the discharge of some social or moral duty, or that the writer or the

(1) 8 C. B. (N.S.) 597.
(2) 2 C. B. 569.
(3) Law Rep. 5 Q. B. 608, 611.
(4) 15 C. B. (N.S.) 418.

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person to whom they were addressed had an interest in making or receiving the communications?" Then he says that in that particular case he felt bound to answer that question in the affirmative. On page 418 there is another passage which appears to me important. He says: "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification; but all are clear that it is a question for the judge to decide, and I am clear that the letters in question, seeing the circumstances under which they were written, do not show what in law amounts to malice." Then he goes on to say that "the rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest. If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth." Then he goes on to make further observations, which I need not read.

Now, adopting the language of Erle, C.J., I ask, do the circumstances shew that the statement complained of was made in the discharge of some social or moral duty, or that the speaker or the person addressed had an interest in making or receiving the communication? That Stanley had an interest in the character of his servant and in receiving the communication made to him can hardly be denied. His interest in the matter is too obvious to require comment. If I understand rightly the judgment I have just read, Stanley's interest in receiving the communication made to him is alone sufficient to render the occasion of making the communication a privileged occasion. But this would be going further than is warranted by the language of Mr. Baron Parke in *Toogood* v. *Spyring* (1); it would not, therefore, be satisfactory to pass over the other matters indicated as important for consideration—I mean the defendant's interest in making the communication and his duty

(1) 1 C. M. & R. 181.

to make it. Considering that Stanley and the plaintiff were just about to leave Newcastle when the defendant spoke to Stanley, I am not prepared to base my judgment on the ground that the defendant made the communication complained of in the conduct of his own affairs or in a matter in which his interest was concerned. I am not clear that the defendant had an interest as distinguished from a moral or social duty to act as he did.

But the question still remains whether the defendant was not under a moral or social duty to make such communication. Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief. As Chief Justice Tindal said in *Coxhead* v. *Richards* (1), if the defendant took a course not justifiable in a Court of law, he, and not the plaintiff, must suffer for the error. In *Waller* v. *Loch* (2), the Master of the Rolls (Sir George Jessel) is reported to have said that if the defendant bonâ fide thought that he was discharging a moral or social duty he would be protected, but in so saying the learned judge was not distinguishing a privileged occasion from malice, and his observation, if intended to apply to privileged occasions, is not in conformity with other authorities. Some passages in the judgments in *Pattison* v. *Jones* (3), which were relied upon in support of the view of the Master of the Rolls (Sir George Jessel), obviously had reference to malice, and not to privileged occasion. Upon the point I am now considering, the head note in *Whiteley* v. *Adams* (4) goes too far, and further than the judgments themselves warrant. The duty was affirmed by the Court, and did not rest on the defendant's belief, although his belief shewed that there was no malice.

The question of privileged occasion turning then on the question of moral or social duty and being a question of law for the judge and not a question for the jury, it is necessary to

(1) 2 C. B. 569, 595.
(2) 7 Q. B. D. 619.
(3) 8 B. & C. 578.
(4) 15 C. B. (N.S.) 418.

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consider the grounds on which such duty can be maintained. The grounds in this case are the relation in which the defendant stood to Stanley and the relation in which the defendant stood to the public. His relation to Stanley was that of host to guest, and, to some extent, of friend to friend. His relation to the public was that of mayor and magistrate in Newcastle, where Stanley was when the communication was made. The defendant knew that Stanley was about to be entertained by other people at other places, and that the plaintiff would accompany him. Under these circumstances, I am clearly of opinion that it was the defendant's moral or social, though not legal, duty to communicate to Stanley the information which the defendant had received. That information was no vague rumour or idle gossip, but came officially from the chief constable of Edinburgh to the chief constable of Newcastle, and was sent by him to the defendant, who was, as I have said, Mayor of Newcastle and the host of Stanley. Suppose the suspicion which had fallen on the plaintiff had been well founded and not ill-founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified reticence? I answer no; he would not have been acting up to his duty either to the public or to Stanley. Suppose the plaintiff had proved dishonest at the next place he visited, would the defendant then have been free from moral blame if he had not communicated to Stanley what he had learned from the police? In my opinion the defendant would then have been greatly to blame if he had held his tongue. The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff. My own opinion is clear and strong that it was his moral or social, although not his legal, duty to do so; in other words, the occasion was privileged, and the judge should

have directed the jury to this effect. It follows that there ought to be a new trial unless there was no evidence of malice on which a jury could properly find a verdict for the defendant.

I pass, therefore, to the consideration of the question of malice. If the occasion is privileged the plaintiff must prove malice in fact; the burden of proving this is on him, as was settled in *Clark* v. *Molyneux*. (1) Malice, in fact, is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett, L.J., every wrong feeling in a man's mind: *Clark* v. *Molyneux*. (2) There is no question here of the belief by the defendant in the truth of what he said. He did not say or intimate that the plaintiff had stolen a watch—he merely stated that the Edinburgh police suspected the plaintiff of having done so, which was true enough. This case illustrates the truth of the remark made by Lord Bramwell in *Clark* v. *Molyneux*. (3) He said, "A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character as on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander?" What, therefore, has to be ascertained is whether the defendant acted bonâ fide in the discharge of that moral duty which he owed to Stanley or whether he acted from some other unjustifiable motive—from some motive other than a sense of duty. As Lord Bramwell said in *Clark* v. *Molyneux* (4), "If the defendant was actuated by some motive other than that which would alone excuse him the jury may find for the plaintiff." (See also page 246, per Brett, L.J.)

The evidence on this head is contained in the examination and cross-examination of the only two persons present when the defamatory matter was uttered—namely, the defendant and Stanley. I have read their evidence with care, and I can find nothing to support a charge of malice against the defendant. On the contrary, the evidence disproves malice, and shews

(1) 3 Q. B. D. 237.
(2) 3 Q. B. D. 247.
(3) 3 Q. B. D. 244.
(4) 3 Q. B. D. 245.

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affirmatively that the defendant acted bonâ fide in the discharge of what he believed to be his duty, and of what was his duty, and did not exceed (either in what he said or in any other way) what a reasonably careful man would have said or done under similar circumstances. It was contended that the defendant did not shew Stanley the letter written by the Edinburgh police and did not urge on Stanley the necessity for caution so carefully as the Edinburgh police urged caution in their letter to the Newcastle police. But even if the defendant was less cautious than he himself says he was, this would be too slight a matter to warrant a finding of malice against the defendant; and there is positively nothing else on which to found such a charge. The defendant knew nothing of the plaintiff, and could have had no motive whatever for injuring him. The inspector who brought the letter to the defendant suggested to him the propriety of speaking to Stanley on the subject. The defendant took Stanley aside and communicated to him in private the fact that the Edinburgh police had written a letter to the Newcastle police to the effect that the plaintiff was suspected of having stolen a watch when at the Waterloo Hotel in Edinburgh. This was really all that the defendant did. The conclusions, then, at which I have arrived are that the occasion was privileged and that there was no evidence of malice. The judge, therefore, ought to have withdrawn the case from the jury and ought to have given judgment for the defendant. There is no question proper to be left to a jury; there are no grounds for a new trial, the verdict and judgment which have been entered for the plaintiff ought, in my opinion, to be set aside, and judgment ought to be entered for the defendant, with costs here and below. The result may seem hard on the plaintiff, who has unquestionably been injured. It was his misfortune to fall under suspicion, and to be dismissed by his master without inquiry. But this is no reason for holding the defendant responsible for this misfortune, and he cannot be so held without limiting privileged occasions to such an extent as to render the law applicable to them opposed to the general interests of society instead of being in harmony with them, nor without violating the important doctrine which has frequently been asserted by judges of the highest eminence—I mean the

doctrine that the law has not restricted the right to make such communications within any narrow limits.

LOPES, L.J. This is an exceptionally important case, in my opinion. As I take a different view from the other members of the Court, I shall shortly state the facts as I understand them. The plaintiff, who had been in the service of persons of position and had borne a good character, was engaged by Mr. Stanley, the African explorer, as a valet. Mr. Stanley had been at Edinburgh, himself staying with a friend, the plaintiff, his valet, putting up at the Royal Waterloo Hotel. On Thursday, June 19, 1890, Stanley left Edinburgh and proceeded to Newcastle, where he was entertained by the corporation, living with the plaintiff, his valet, at the Mansion House. Stanley left Newcastle the next day. It appears that while the plaintiff was at the Royal Waterloo Hotel a lady lost a gold watch out of her bedroom. While Stanley and the plaintiff were staying at the Mansion House at Newcastle a letter was received by the chief constable of that town from the chief constable of Edinburgh, which, in my opinion, is so important that I think it essential to state its terms in extenso—terms which appear to be entirely overlooked in the judgments of the other Lords Justices, both of which I have read. [The Lord Justice then read the letter of June 19, 1890, above set out, and continued:—] This letter was shewn to the defendant by the chief constable of Newcastle. As Stanley was leaving the Mansion House the defendant, who had driven there for the purpose of escorting Stanley to the station, called him into a private room near the entrance door and told him that a lady's gold watch and chain had been stolen at the Waterloo Hotel and that suspicion had fallen upon the plaintiff. The letter itself was not shewn to Stanley, but had been shewn by the chief constable to the defendant. Stanley some few days afterwards communicated what the defendant had told him to the plaintiff, and dismissed him from his service, alleging as his reason his inability to keep in his service a person who had been suspected of dishonesty.

In these circumstances the plaintiff has brought an action of slander against the defendant. The action came to be tried

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before Wills, J., at Leeds, and resulted in a verdict for the plaintiff for 250*l.*, the learned judge holding that the occasion was not a privileged occasion and leaving only the question of damages to the jury.

We are now asked to grant a new trial or to enter judgment for the defendant, on the ground that the occasion was privileged and on the ground that there was no evidence of express malice. I do not think, if the occasion was privileged, that there was any evidence proper to leave to the jury of express malice; nor do I think it could be successfully contended that the defendant did not act honestly and with good faith, if the occasion was such as to justify his making the communication to Stanley. The question then is whether the occasion was privileged. I do not know that I can express my view of the law in better language than by repeating what I said in *Pullman* v. *Walter Hill & Co.* (1): "Assuming, then, that there was publication, the question next arises whether the occasion was privileged. A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge, and that question only arises when there has been publication to a third party. If the judge holds that the occasion was privileged, there is an end of the plaintiff's case, unless express malice is proved. Was the voluntary placing of the letter in the hands of the type writer a privileged occasion? The rule, I think, is this—that when the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged. So, again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it." The duty may be legal, social, or moral. I believe this to be the true principle deducible from all the authorities, and I do not think it necessary to refer to the cases which have already been exhaustively dealt with by Lindley, L.J. I cannot understand how it can be said the defendant had any interest in making the statement to Stanley. Stanley and the plaintiff were on the point of leaving the

(1) [1891] 1 Q. B. 524, at p. 529.

Mansion House. What interest had the defendant in communicating to Stanley a suggestion of dishonesty with regard to the plaintiff which occurred at another place and before Stanley and the plaintiff came to the Mansion House?

Again, there was no legal duty making it incumbent on the defendant to make the communication to the plaintiff. If any duty at all, it must be a moral or social duty. Having regard to the position the defendant occupied towards Stanley—namely, that of host—I can well imagine cases where socially and morally it would have been the duty of the defendant to make a communication to Stanley with regard to his servant. But surely it is all-important to observe the nature of the information furnished by the chief constable of Edinburgh to the chief constable of Newcastle which was all that was communicated to defendant, and which was all he had before him when he communicated with Stanley. In order to determine what his duty was towards Stanley the defendant ought also to have regarded his duty and what was just towards the person sought to be inculpated. Was it the duty of the defendant in his desire to serve Stanley to overlook the grievous wrong to which by his want of caution he might subject the plaintiff? Was he justified, having regard to the exceptionally cautious and careful character of the information which he had received, in acting as he did? Let us carefully scan the letter of the chief constable of Edinburgh—a more careful and judicious document it would be difficult to describe. He states the ground of suspicion, and then says:—"As you will readily observe, the groundwork of suspicion is very slender, and unless trace of the property to Stuart's possession was obtained no action can be taken against him. The chief constable will be glad if you can see your way to have very careful and cautious inquiry made with the view of discovering whether Stuart is or has been in possession of the property. In the view that Stuart may be quite innocent, I am to urge that the inquiry should be so conducted as not to injure Stuart unless evidence of his guilt be obtained." The defendant says:—"I had obtained no evidence of Stuart's guilt before I went to Stanley." "I did not speak to Stanley for any detective purpose or to help the police." "I did not think of Stuart at all." Having regard to the terms of that

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letter, so far from its being the duty of the defendant to communicate what he did to Stanley, I think it is the last thing he ought to have done. He is told the groundwork of suspicion is very slender. He is urged that, inasmuch as Stuart may be quite innocent, any inquiry is to be so conducted as not to injure Stuart unless evidence of his guilt is obtained. What does he do? Without obtaining any evidence, without any inquiry, in hot haste he makes a communication to the master impugning the honesty of his servant. I cannot think the defendant in so acting was discharging any duty, social or moral. I think it was an officious and uncalled for act on his part, and that therefore the occasion was not privileged. *Waller* v. *Loch* (1) was relied on by the learned counsel for the defendant, and certain expressions of the Master of the Rolls (Sir George Jessel) were cited. I feel confident that that learned judge was referring not to a privileged occasion, but to a privileged communication, and the question of malice which then arises. He could not have said that if a defendant bonâ fide thought that he was discharging a moral or social duty that would be sufficient to constitute a privileged occasion although no such duty existed. Such a principle is opposed to all the authorities, is against common sense, and would be lamentably far-reaching and unjust in the consequences it would produce. In my opinion the learned judge was right and the verdict and judgment ought to stand.

KAY, L.J. I cannot help regretting, as Lopes, L.J., differs from Lindley, L.J., that the casting vote does not fall to one to whom the law on this subject is more familiar than myself; but I am bound to give my own opinion, which I have formed after careful consideration. The question must be considered upon the basis that the suspicion suggested against the plaintiff's honesty is altogether unjust. He was valet to Mr. Stanley. The circumstances which raised the suspicion were communicated with all proper caution and reserve by the police at Edinburgh to the superintendent of police at Newcastle, obviously because it was known that Mr. Stanley and the plaintiff, his servant, were then at Newcastle, and with the object that very cautious inquiries

(1) 7 Q. B. D. 619.

should be made by the Newcastle police, principally as to whether the plaintiff was in possession or had in any way disposed of the stolen property. Mr. Stanley and the plaintiff were then staying at the Mansion House at Newcastle, and were the guests there of the mayor, but the mayor did not himself reside at the Mansion House. However, there was property in the Mansion House, which I suppose it would be the mayor's duty to protect. It seems to me quite natural that the superintendent of police should have communicated as he did the letter which he had received from the police at Edinburgh to the Mayor of Newcastle, and I do not understand that the plaintiff makes any complaint on that ground. The mayor communicated the suspicion suggested by this letter to Mr. Stanley verbally. He did not at that time shew him the letter. He only told him that the Edinburgh police suspected the plaintiff, which was perfectly true; he did not say that the plaintiff was dishonest. This verbal statement was made at the Mansion House just before Mr. Stanley left—in fact, when the mayor had gone thither to escort his guest to the railway station. The evidence makes it clear that the communication was not made for the purpose of founding any inquiry or eliciting information from Mr. Stanley for or against the suspicion. The learned judge has ruled that the position of the mayor and Mr. Stanley was not such as to privilege the mayor to make this communication to Mr. Stanley by way of warning.

The law on the subject cannot be better stated than in the words of Erle, C.J., in *Whiteley* v. *Adams* (1): "The foundation of an action for defamation is malice, but defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by shewing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer and again lately in the Court of Queen's Bench, that if the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the person writing or uttering them, he is bound to hold

(1) 15 C. B. (N.S.) 392, 414.

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that the action fails." It has been argued in this case that whether the mayor had such a duty or not, yet, if he made the communication in the honest belief that it was his duty to make it, the occasion would be privileged. No decision going so far as that has been cited, and such a doctrine would not be within the words which I have quoted from Erle, C.J. I do not think that argument can be maintained.

The real question is whether the mayor had a social or moral duty to communicate this information to Mr. Stanley, or whether he and Mr. Stanley had such a common interest in the matter so communicated as to justify the communication on that ground. Lord Wensleydale, in *Toogood* v. *Spyring* (1) states the rule of law thus: "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." In that case the defamatory statement complained of was made concerning a workman employed by the agent of the landlord to do repairs at a farmhouse, and it was made by the tenant of the farm to the landlord's agent. It was held privileged because of the common interest which they had in the work being well done. The tenant was complaining that the work was not well done, that the man had got drunk while he was doing it, and that he believed that he had broken open the cellar door and taken out cider. The learned judge said, in addition to the remarks which I have quoted, that such a communication was privileged "if made with honesty of pur-

(1) 1 C. M. & R. 181.

pose to a party who has an interest in the inquiry, and that has been very liberally construed." The case of *Toogood* v *Spyring* (1) was cited with approval, and part of the words which I have read from it were quoted in the judgment of the Privy Council in *Hamon* v. *Falle* (2), and it was followed in *Croft* v. *Stephens* (3), where the defendant returned some goods to a tradesman on the ground that he had not ordered them. The tradesman thereupon sent him the letter ordering the goods, which purported to be signed by the defendant, to which the defendant replied that it was his firm opinion that the letter was in the plaintiff's handwriting. This communication was held privileged because the defendant and the tradesman had a common interest in ascertaining in whose handwriting the letter was. In the present case Mr. Stanley and his servant were both staying as guests of the mayor in the Mansion House, which we must take to have been under the mayor's control. I think it must be treated for this purpose as though it had been the mayor's own house. He was greatly interested in the honesty of his guests. It is true that they were on the point of leaving, but if it is admitted that the communication would have been privileged on the ground of common interest if their stay had been prolonged, I do not see how it can possibly be said that such interest ceased until they had actually left the house. Indeed, there is some reason for saying that the moment of departure was the most critical period of the visit, if the suspicion of the plaintiff's honesty had been well-founded. Lord Wensleydale says, as I have pointed out, that the question of interest in the inquiry has been very liberally construed. Without any great liberality of construction, the communication in this case might be considered privileged on the ground of the common interest of the mayor and Mr. Stanley in the subject.

But I do not rest my judgment on this point alone or principally. There is in addition to that consideration the relation of host and guest which existed between them at the time when the communication was made. I have a strong impression that this relation imposed upon the mayor a social and moral duty to act as he did. The true mode of judging upon the question is to

(1) 1 C. M. & R. 181. (2) 4 App. Cas. 247.
(3) 7 H. & N. 570.

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put oneself as much as possible in the position of the defendant. I think that most reasonable and cautious people under the same circumstances would have acted as he did, and would have done so from a sense of the duty of a host to his guest.

For these reasons I differ with respect from the learned judge, who ruled that the defendant was not privileged to make the communication in question to Mr. Stanley. I think that he was so privileged.

But then this privilege will be lost if the defendant was actuated by malice; and if there was evidence of such malice, the question must be tried by a jury. I have read though the evidence again, both in the notes of the learned judge and in the shorthand notes with reference to the question. The result is that not only am I convinced of the entire absence of malice on the defendant's part, but, further, I cannot find any evidence of it whatever. The communication which he made was a cautious one, to the effect that the plaintiff was suspected only, and did not go beyond the terms of the letter which had been shown to him. The superintendent of police at Newcastle, who shewed him the letter, suggested that he should communicate its contents to Mr. Stanley. The defendant did not know the plaintiff. In fact he says he had never seen him. There was no conceivable reason why he should have any malicious motive or feeling in the matter. It seems to me neither necessary nor proper to submit the case again to a jury, and I think that the action should be dismissed.

Appeal allowed.

Solicitors for plaintiff: *John Nicholls & Co.*

Solicitors for defendant: *Collyer-Bristow & Co., for Hill Motum, Newcastle-on-Tyne.*

W. W. K.

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Metropolis Management Acts—Street Improvement Expenses—Church Building Acts—Site for Church—Consecration of Part of Site—Vesting of Site in Incumbent—Ecclesiastical Commissioners—18 & 19 *Vict. c.* 120, *ss.* 105, 250; 25 & 26 *Vict. c.* 102; 8 & 9 *Vict. c.* 70, *s.* 13.

By 8 & 9 Vict. c. 70 (Church Building Acts Amendment Act), s. 13, the "freehold of the site of every church" of which the Commissioners therein mentioned shall accept a conveyance under the Church Building Acts (as to any church not yet consecrated, when the same shall be consecrated), shall vest in the incumbent.

Land having been conveyed under the Church Building Acts to the Ecclesiastical Commissioners as a site for a church, a church was afterwards erected on a part of the land, and the church and part only of the land were consecrated:—

Held, that upon such consecration, the whole of the land so conveyed to the Commissioners vested in the incumbent; that the Commissioners ceased to be the owners of it, and were therefore not liable under the Metropolis Management Acts, 1855 and 1862, to contribute in respect of it towards the cost of paving a new street.

SPECIAL CASE stated in an action to recover certain sums of money as an apportioned part of the expense of paving a new street under the Metropolis Management Acts, 1855 and 1862.

By a deed of conveyance of October 18, 1886, Lord Northbrook, with the concurrence of others, granted to the defendants, the Ecclesiastical Commissioners for England, in fee simple, a piece of land to be appropriated as and for a site of an intended new church with a yard and enclosure thereto to be called "St. Augustine's Church, Grove Park," and to be devoted, when consecrated, to ecclesiastical purposes within the meaning of the Church Building Acts. The church was built on part of the land, and was, together with that part, consecrated by the bishop. Between the date of the conveyance and the consecration, a wire fence was put up across the unconsecrated part of the land at a distance of about thirteen feet from the boundary of the consecrated part. The unconsecrated part had not been let, occupied, or built upon since the consecration of the rest. The land bounded or abutted on the Bromley Road, which was a new street within the Metropolis Management Acts, 1855 and 1862.

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The plaintiffs, the Board of Works for the Plumstead District, constituted as such Board under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), paved the road, apportioned the expenses, and demanded payment of a part thereof of the defendants as owners of the unconsecrated part of the land, by virtue of ss. 105 and 250, and Metropolis Management Act, 1862 (25 & 26 Vict. c. 102). The question was whether the defendants were in respect of such land at the date of the demand "owners of land" within the meaning of those words in the Metropolis Management Acts, 1855 and 1862. (1)

Channell, Q.C., and *Forman*, for the plaintiffs. The unconsecrated land is by the Church Building Acts (2) vested in the

(1) By 18 & 19 Vict. c. 120 (Metropolis Management Act, 1855), s. 250, the word "owner" shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.

(2) By 58 Geo. 3, c. 45, s. 33, the Commissioners may accept any land proper for sites of additional churches, not exceeding in quantity what may be sufficient for building of a church, providing a churchyard, and making a proper access thereto, and every such site when conveyed to them and the church erected thereon and notice thereof given to the bishop, shall become for ever devoted to ecclesiastical purposes only; and also may accept land for a house for the incumbent which (on consecration of the church) shall vest in him. By s. 51 they may sell such lands as shall not be wanted for the purposes of the Act.

By 59 Geo. 3, c. 134, s. 34, if any such lands happen to remain unconsecrated at the end of ten years, they shall be vested in the Crown, to be applied to the purposes for which they were acquired, unless or until some other provision shall be made by parliament.

By 3 Geo. 4, c. 72, s. 34, in case the Commissioners shall determine not to apply the land to any of the purposes of the Acts they may exchange it for any other more eligible for the purpose for which it was given, or with the consent of the grantor apply it to any other ecclesiastical purpose either as glebe or otherwise for the use of the incumbent or for a school, or any other charitable or public purpose, or reconvey "any such land or ground or any part thereof, in case only a part of such land or ground shall have been applied to the purposes of the Acts," to the grantor or his heirs or successors.

By 3 & 4 Vict. c. 60, s. 19, in case the Commissioners shall determine to apply a part only of such land or ground to any of the purposes of the Acts they are empowered with the consent of the grantor to apply it to any other ecclesiastical purposes.

By 8 & 9 Vict. c. 70, s. 13, in all cases the freehold of the site of every church of which the Commissioners shall accept a conveyance under the

Commissioners; they could sell, retain, exchange it, or apply it to several purposes, ex gr., for schools or a vicarage. In *Bowditch* v. *Wakefield Local Board of Health* (1) the trustees of a schoolhouse and buildings were held liable as "owners" within s. 2 of the Public Health Act, 1848, to contribute to the paving of a street, although by the terms of the trust deed the premises could be used only for a school. Blackburn, J., said that if the school ceased, they might be let. There is no express restriction in the present case. The land is not placed "extra commercium," as Lord Watson said on reviewing the authorities in *Great Eastern Ry. Co.* v. *Hackney Board of Works.* (2) Even assuming that the premises would not be let, the defendants may be liable as owners. In *Wright* v. *Ingle* (3) Bowen, L.J., speaking of the definition clause, s. 250 of the Metropolis Management Act, 1855, now in question, said, "I think *Bowditch* v. *Wakefield Local Board of Health* (1) is a conclusive authority, if authority were wanted, to shew that a man is not the less the "owner" of the premises, because by the provisions of the deed under which he holds them they cannot, so long as he holds them, be let at a rack rent." The Commissioners have the ordinary rights of ownership. They can sell the land, and if they did so would probably obtain a price enhanced by the proximity of the road, and they are liable to contribute to the repair of it.

F. Meadows White, Q.C., and *T. T. Paine*, for the defendants. The land given to the Commissioners is all one property conveyed as the site of a church. The Acts vest it in the incumbent without conveyance, as soon as the church is consecrated. The "site" is the whole area, and not the mere piece on which the church stands. By 58 Geo. 3, c. 45, s. 33, the Commissioners may accept any lands proper for sites of additional churches, not exceeding in quantity in any one place what may be sufficient for three purposes—viz., "building of a church, providing

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Acts (as to any church not yet consecrated, when the same shall be consecrated) shall vest in the incumbent.

By 19 & 20 Vict. c. 55, the powers and obligations of the Church Building Commissioners were transferred to the Ecclesiastical Commissioners.

(1) Law Rep. 6 Q. B. 567.

(2) 8 App. Cas. 687, at p. 693.

(3) 16 Q. B. D. 379, at p. 402.

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a churchyard, and making a proper and sufficient access or approach thereto;" and "every such site," viz., the whole land so accepted, "when conveyed to the Commissioners, and the church erected thereupon, and notice thereof given to the bishop, shall become for ever devoted to ecclesiastical purposes." It was unnecessary to consecrate more of the land than was consecrated. But the rest of the land is still the "site." Under 8 & 9 Vict. c. 70, s. 13, it has all passed to the incumbent, and away from the Ecclesiastical Commissioners, who have no funds out of which to discharge the demands of the plaintiffs. The legislature could not have intended that unconsecrated parts of sites should be left vested in the Commissioners in various parts of the country, while the consecrated parts were vested in the incumbent.

[The COURT called on counsel for the plaintiffs to reply on this point.]

Forman, in reply. The burial ground is, as a rule, the land immediately around the church, and is separately dealt with in the Acts. Therefore, the word site is used in 8 & 9 Vict. c. 70, s. 13, in a limited sense only, including the actual site of the church and perhaps a few feet surrounding it. The Acts appear to include only what has been or may be consecrated. 58 Geo. 3, c. 45, s. 33, provides that the site may be consecrated. But the church and part of the land only has been consecrated. The Act 3 Geo. 4, c. 72, s. 34, contemplates the present case, where part of the land is consecrated and part is not, and enables the Commissioners to reconvey the part not applied to the purposes of the Acts.

DENMAN, J. I am of opinion that the Ecclesiastical Commissioners are not liable to the charge which has been imposed upon them. I do not found my judgment, on the peculiar nature of the land, nor on the construction of the particular word "owner" as used in the definition clause of the Metropolis Management Acts, but on the ground that they are not "owners" in any sense. The land is not vested in them. Their duties are the creation of statute. They are the successors to other Commissioners, and have the same rights, duties, and

liabilities, so far as this matter is concerned, as those former Commissioners had. The origin of the alleged ownership, if any, on which the plaintiffs rely is to be found in 58 Geo. 3, c. 45, s. 33, which empowers the Commissioners "to accept and take any . . . . lands . . . . proper for sites of additional churches, ... not exceeding in quantity in any one place what may be sufficient for building of a church, ... providing a churchyard, and making a proper and sufficient access or approach thereto, from any persons willing to give the same; and every such site, when conveyed to the said Commissioners, and the church erected thereupon, ... shall become for ever thereafter devoted to ecclesiastical purposes only, in order that the same may be consecrated by the bishop to public worship . . . ." The Commissioners accepted a conveyance of land, and the contention of the defendants is that such land was a "site" within the meaning of s. 33, and also within subsequent Acts, which had the effect of vesting the whole "site" in the incumbent. I do not say that there are not difficulties in taking that view of the matter, but they are much less than the insuperable objections to any other view of it. By 3 Geo. 4, c. 72, s. 34, ". . . . in every case in which any grant . . . . shall be made of any land or ground, for any of the purposes of the Acts as a gift . . . . and in which the Commissioners shall determine not to apply such land or ground to any of the purposes of the . . . . Acts, it shall be lawful for the said Commissioners . . . . to exchange any such land or ground for any other land or ground which may in the judgment of the said Commissioners, be more eligible for the purpose for which the same was given; or with the consent of the grantor, ... to apply such land or ground to any other ecclesiastical purposes . . . .; or to reconvey . . . . any such land or ground or any part thereof, in case only a part of any such land or ground shall have been applied to the purposes of the Acts, to the grantor . . . . thereof. . . . ." That is the section which raised doubt in my mind, for it seemed strange that the Commissioners should have power to reconvey the land if it was not vested in them at the time when the reconveyance was most likely to be determined upon. But I see no difficulty in construing that enactment to mean that so long

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as the land is vested in the Commissioners they shall have the powers prescribed, and it is not inconsistent with such construction that under this or other Acts the whole of the land should in a certain event be vested in some one else, and, if vested in some one else, then that the powers of the Commissioners should cease, and they could not reconvey land no longer vested in them. I next turn to 8 & 9 Vict. c. 70, s. 13, on which the learned counsel for the defendants relied to shew that the Commissioners are not persons who can be regarded as owners of the land in any sense, because it is really vested in some one else. By s. 13 ". . . . the freehold of the site of every church, of which Her Majesty's said Commissioners may have accepted or shall accept a conveyance under the provisions of the hereinbefore recited Acts or any of them (as to any church not yet consecrated, when the same shall be consecrated,) shall vest in the incumbent for the time being of such church." The words "freehold of the site of every church" must be read with those following—viz., "of which Her Majesty's said Commissioners may have accepted, or shall accept, a conveyance" under the Acts. In the present case the Commissioners have accepted a conveyance under those Acts of land called a "site" within the terms of that section. I think that "freehold of the site" of the church means freehold of a site conveyed within the meaning of the Acts for the purpose of building—not a mere church of four walls on foundations, but—a church on a site intended to be used for ecclesiastical purposes, and, at all events as to part, to be consecrated for a church. I do not think that the mere fact that part is unconsecrated prevents the whole from being the "freehold of the site of a church" within the meaning of the enactment. Looking upon the words as words of description, they contain an intelligible description, and I think that it is reasonably clear that the whole of the land given for the site of the church, and accepted by the Commissioners, did, on the consecration of the church and a portion of the land, vest in the incumbent so that, at all events, the Ecclesiastical Commissioners were divested of it. I do not wish to give any decision which shall prevent the incumbent from raising the whole question discussed by the learned counsel for the plaintiffs, because he

has not been represented or heard. We confine our decision entirely to the point taken on behalf of the defendants, and give judgment for them.

WILLS, J. I am of the same opinion. The difficulty of putting an intelligible and, at the same time, grammatical construction on the Church Building Acts is not so great in this case as in many others. The present case becomes clear if the history of the Acts is considered. By 58 Geo. 3, c. 45, s. 33, "it shall be lawful for the Commissioners to accept and take any . . . lands . . . proper for sites of additional churches, . . . not exceeding in quantity in any one place what may be sufficient for building of a church, . . . providing a churchyard, and making a proper and sufficient access or approach thereto, from any persons willing to give the same; and every such site,"—which clearly means the whole of such land—"when conveyed to the said Commissioners, and the church erected thereupon, and notice given to the bishop . . . , shall become for ever thereafter devoted to ecclesiastical purposes only"— so from that time the whole of the land is stamped with the character of ecclesiastical land—"in order that the same may be consecrated by the bishop to public worship . . . ." It seems to have escaped the attention of the framers of the Act that the area consecrated might not be coincident with the whole, and that was soon perceived, for in the next year the legislature by 59 Geo. 3, c. 134, s. 34, enacted that "if any lands . . . . which shall have been acquired by the Commissioners . . . . shall happen to remain unconsecrated at the end of the term of ten years . . . . such unconsecrated lands . . . . shall be immediately vested in His Majesty, his heirs and successors, to be applied to the uses, intents, and purposes for which they were acquired, under the direction of His Majesty in Council." That is to say, I suppose, that if the persons interested were so slow in movement that in ten years nothing had been done, or only a portion of the land had been consecrated, the action of the Privy Council might be evoked to stir up the Commissioners to proceed to obtain consecration, but the section gave the Commissioners no further power to deal with the land. That is a strong indication that the legislature thought that

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the whole of the land was vested in the Commissioners, because it required an enactment to divest it. So matters stood under 59 Geo. 3, c. 134, s. 34, and were to remain "until any other provision respecting the same should be made by authority of Parliament." The legislature made further provision by 3 Geo. 4, c. 72, an amending Act, which by s. 34 enacted that "in every case in which any grant shall have been or shall be made of any land or ground, for any of the purposes of the said recited Acts or this Act, as a gift . . . , and in which the Commissioners shall determine not to apply such land or ground to any of the purposes of the said recited Acts or this Act," the Commissioners may deal with it as therein prescribed, and in case only a part of such land shall have been applied for those purposes, may reconvey that part to the grantor. That was an intelligible scheme, and as things then stood the land would have remained not vested in the incumbent; because the original enactment declared that the site should be devoted to ecclesiastical uses, but only provided that any house or land accepted for the residence of the incumbent should, on consecration of the church, vest in him, and there was no provision up to that time for vesting the whole site of the church in the incumbent in accordance with the general law. Therefore 8 & 9 Vict. c. 70, was passed which, by s. 13, completed the scheme, and vested the land which had been dealt with by the original enactment, 58 Geo. 3, c. 45, s. 33, in the incumbent, and the only question is whether the words, "the freehold of the site of every church," in s. 13 are to be confined to the church itself, or whether they are used in the broad sense in which they are used in the initial enactment on which the other Acts were subsequently grafted. It is said that this is an amending Act, and not inconsistent with 58 Geo. 3, c. 45; but it is not so, because it seems plain that until this vesting section takes effect the 3 Geo. 4, c. 72, leaves a portion of the land in the Commissioners. I see no reason for restricting the word "site" to the narrow meaning sought to be put on it. Our interpretation is more consistent with the general scheme of the ecclesiastical law and more reasonable in itself, and is quite consistent with the language of the section with which the whole legislation begins. I come to the con-

clusion that this piece of land is no longer vested in the Commissioners, and I guard myself from expressing any opinion that the incumbent is liable.

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Judgment for the defendants.

Solicitor for plaintiffs: *G. Whale.*

Solicitors for defendants: *White, Borrett & Co.*

J. R.

[IN THE COURT OF APPEAL.]

April 23, 24.

WALTER *v.* EVERARD.

Infant—Apprenticeship Deed—Covenant to pay Premium—Liability.

In an action by the master of an apprentice upon a covenant in the apprenticeship deed by the apprentice, who was an infant at the date of the deed, for the payment of the balance of the premium three years and a half after that date, the jury found that the deed was a provident and proper arrangement for the infant, and necessary, if he wished to learn the business to which he was apprenticed, that the premium was fair and reasonable, and that instruction had been given under the deed:—

Held, that the liability of the infant for necessary instruction duly provided stood upon the same footing as that for ordinary necessaries supplied to him, and that consequently the fact that he had entered into a covenant under seal for the payment of the premium did not prevent him from being liable for the amount claimed.

ACTION by a master against his apprentice for 300*l.*, the balance of premium due under the defendant's covenant in the apprenticeship deed.

At the trial before Grantham, J., with a jury, it appeared that the action was upon a covenant in a deed of apprenticeship, dated May 21, 1886, and made between the defendant's mother, the defendant, then an infant of the age of seventeen, and the plaintiff. By this deed, in consideration of 500*l.* to be paid to the plaintiff by the defendant, 200*l.* upon the execution of the deed, and 300*l.*, the balance, on December 20, 1889, the defendant, with the consent of his mother as his guardian, bound himself to the plaintiff to learn the businesses of an auctioneer, valuer, and farmer, for the term of four years from the date of the deed. And the defendant covenanted with the plaintiff that he (the defendant) would, on December 20, 1889, pay to the plaintiff

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the said sum of 300*l.* And the mother and the defendant jointly and severally covenanted with the plaintiff that the defendant should and would at all times obey the lawful and reasonable commands of the plaintiff, and should according to the best of his power assist the plaintiff in carrying on the businesses of an auctioneer, valuer, and farmer. And the plaintiff, in consideration of the 500*l.* and of the faithful services to be rendered to him by the defendant, covenanted with the defendant and his mother that he (the plaintiff) would instruct the defendant, and would endeavour to impart to him a full and perfect knowledge of the businesses of an auctioneer, valuer, and farmer.

The defendant received instruction under the deed, but made default in the payment of the 300*l.* at the time appointed. The action was brought after he had attained twenty-one.

The jury found that the deed was a provident and proper arrangement for the defendant, that the arrangement was a necessary one for the defendant, if he wished to learn auctioneering, valuing, and farming, and that the premium was a fair and reasonable one. Judgment was entered for the plaintiff for 300*l.* and costs.

The defendant moved for a new trial on the ground that the verdict was against the weight of evidence, and also that the judge ought to have directed the jury that no action could be brought against the defendant on his covenant to pay 300*l.*, because he was an infant at the date of the deed.

Gould, for the defendant. The infant cannot be sued on the covenant in any circumstances, even if the finding of the jury that the deed was for his benefit was correct: *De Francesco* v. *Barnum* (1); *Gylbert* v. *Fletcher.* (2) [He was stopped.]

Dugdale, Q.C., and *E. W. Garrett*, for the plaintiff. The jury having found that the deed was a beneficial one, so that the case is like that of an infant sued for necessaries: *Chapple* v. *Cooper.* (3) In Co. Litt. 172 A it is said: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or

(1) 43 Ch. D. 165; 45 Ch. D. 430, 439.
(2) Cro. Car. 179.
(3) 13 M. & W. 252.

instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing, with a penalty, for the payment of any of them, that obligation shall not bind him." And Mr. Hargrave, in his note, says: "Lord Coke's words imply that a single bond—that is, one *without a penalty*, being given for necessaries, may be good against an infant; and so it hath been frequently adjudged."

[LORD ESHER, M.R., referred to *Pickering* v. *Gunning*. (1)]

Gould, for the defendant. An action cannot be maintained on an infant's covenant, even if it be in an apprenticeship deed. Money advanced to pay an apprenticeship fee for an infant cannot be recovered on his promise to repay it, because it is not a necessary: *Smith* v. *Gibson*. (2)

The text-writers state that an infant is not liable on his covenant: Simpson on Infants, 2nd ed. p. 96; Pollock on Contracts, 5th ed. p. 71; Addison on Contracts, 8th ed. p. 455.

[FRY, L.J. In *Russel* v. *Lee* (3) it was held that a single bill given by an infant for necessaries was good, but not an obligation with a penalty.]

[The following cases were also referred to: *Ayliff* v. *Archdale* (4); *Pickering* v. *Jacobs* (5); *Baylis* v. *Dineley* (6); *Cooper* v. *Simmons* (7); *Keane* v. *Boycott*. (8)]

Secondly, even if the infant would be bound in the case of necessaries, this covenant was not given in respect of necessaries.

LORD ESHER, M.R. The plaintiff, who is an auctioneer and a farmer, sues the defendant, who was apprenticed to him while he was an infant, and who has now attained full age, upon a covenant contained in the deed of apprenticeship, whereby the defendant covenanted with the plaintiff to pay a part of the premium which was to fall due at a future date. The main answer of the defendant to the plaintiff's claim is, that the covenant is contained in a deed which was executed at a time when he was an infant, and that he is not bound by the deed even

(1) Sir W. Jones, 182; Palm. 528.
(2) Peake Add. Ca. 52.
(3) 1 Lev. 86.
(4) Cro. Eliz. 920.
(5) March, 145.
(6) 3 M. & S. 477, 482.
(7) 7 H. & N. 707.
(8) 2 H. Bl. 512.

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after he has come of age. Primâ facie, no doubt, that allegation is well founded. But the plaintiff's reply is, It is true you would not have been bound by the covenant, if it had not been executed in consideration of necessaries supplied to you. I undertook to supply you with necessaries, and I did so. I gave you instruction in the businesses of a farmer and an auctioneer and valuer, and those instructions were necessaries, having regard to your station in life. The defendant's answer is, Admitting this to be so, nevertheless you are not entitled to sue me on my covenant or bond.

We have looked at the authorities in order that we may see whether, in an action upon a bond given by an infant for the payment of a premium for his education in a trade, it is open to the jury to find that the consideration for the premium was the supply of necessaries to the infant, and whether, if the jury find that it was, the fact that the document was under seal will prevent the plaintiff from recovering. It is not true that you can sue an infant upon a bond given by him for the price of necessaries supplied to him with all the ordinary incidents of such an action. The plaintiff cannot simply put in the bond against the infant, and say, That bond is under your seal, and there can be no inquiry into the consideration given for it. We have to go back to the old authorities to see whether this is so. The defendant's counsel contends that there is no instance of an infant having been sued upon such a bond. But the old books shew that such an action has been brought before—not, of course, very frequently, because it was not the common practice for an infant to execute an apprenticeship deed for the purpose of covenanting to pay the premium. As a general rule the premium was paid or to be paid by the infant's parents or friends, and they bound themselves to pay it, and in ordinary cases the master did not look to the infant, but to his friends who had made themselves responsible. But there are authorities of very great weight which shew that the infant can bind himself in such a case. The first authority is to be found in a passage in Coke upon Littleton. [His Lordship read the passage which is quoted above, and continued:—] You cannot sue the infant upon his bond as a bond. But, if the bond is what is called a

"single" bond—that is, if it is given only for the reasonable price of the necessaries supplied to the infant, and there is no penalty, the infant can be sued upon it. Why, if an infant can be sued, as it is well settled that he can, for the price of necessaries supplied to him, should he not be sued for the same thing upon his bond which he has given for it? To say that he could not would have been the height of technicality even in the most technical age of the English law. Again, Mr. Hargrave explains the matter in exactly the same way in his note to Coke upon Littleton. Has this view of the law been acted upon by the Courts? *Ayliff* v. *Archdale* (1) shews distinctly that it has. Then in *Russel* v. *Lee* (2) it was held that an infant's single bill for necessaries was good, but not an obligation with a penalty. There reliance was placed on the above passage in Coke upon Littleton, and the case was a judicial declaration of the law in accordance with it. Again, in *Keane* v. *Boycott* (3), the same passage in Coke was cited with approval, and the decision amounted to a declaration that it was the law. So, in *Baylis* v. *Dineley* (4), Bayley, J., recognized the law as laid down by Coke, and impliedly expressed his approval of it. It is true this is not a binding decision, but the authority is a very high one. Then, in *Cooper* v. *Simmons* (5), Martin, B., gave a very elaborate exposition of the law, reviewing the authorities, and laying down the law in accordance with them. It comes in the result to this—that a bond given by an infant for the price of necessaries does not prevent the obligee from recovering that price from him, if the bond is a single one, and it is not relied on simply as a bond. In the same way an infant can be sued upon a covenant by deed for the price of necessaries, but the case must be treated just as if there had been no deed. The Court must inquire whether the things in question were in fact supplied to the infant, and whether, according to the ordinary rule, that which was supplied was necessary. The Court must do exactly what it would do if there were no deed, and what it certainly would not do in the case of an ordinary deed not given by an infant.

(1) Cro. Eliz. 920.
(2) 1 Lev. 86.
(3) 2 H. Bl. 512.
(4) 3 M. & S. 482.
(5) 7 H. & N. at p. 719.

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Then what are necessaries for an infant? Food and clothing always are necessaries, if the infant cannot obtain them in any other way. Is education a necessary for an infant? Looking at it independently of authority, I should say that education in a trade with a view to making an infant a useful citizen must always in this working country have been thought of the greatest importance, and must always have been considered a necessary for an infant. But on this point we have the authority of the passage in Coke upon Littleton, p. 172 (A), in which Lord Coke lays it down in effect that education in a trade is a necessary for an infant, or rather I should say one of that class of things which may be a necessary. What will make it a necessary? If the infant can obtain the education which he requires in another way, it may not be a necessary. You must have regard to the condition of the infant in life—whether, for instance, he is a young man who will have to earn his living by his own exertions. In the present case the infant was in a condition of life which made it reasonable that he should earn his living by means of the trades to learn which he was apprenticed. The person who sues the infant on his covenant must shew that he did in fact supply him with the necessary education, and that the premium which he charged was reasonable in amount. If he does this he brings himself within all the conditions which would entitle him to recover from the infant if there had been no bond or covenant, and the authorities shew that he is not prevented from recovering by reason of the bond or covenant. The questions, whether the education was necessary, and whether the premium charged was reasonable, were properly left to the jury. It seems to me that the jury have found all the material questions in favour of the plaintiff. In my opinion, therefore, this application must be refused.

FRY, L.J. The action is brought upon a deed of apprenticeship by which the defendant covenanted that he would serve the plaintiff as his master for a term of four years, and that he would pay the plaintiff a sum of 300*l.*, the balance of the premium of 500*l.* which was to be paid to the plaintiff for teaching the defendant certain specified trades. One of the points raised is,

whether the deed was a reasonable and proper one for the infant to enter into. The jury have found that the deed was a provident and proper arrangement for the defendant, that the arrangement was a necessary one for him, if he wished to learn auctioneering, valuing, and farming, and that the premium was a fair and reasonable one. It seems to me that this was a most reasonable and proper finding. There is nothing unusual in the deed, except the covenant by the infant to pay part of the premium. This, no doubt, is very unusual. But the circumstances were unusual. The infant had an expectation of receiving a sum of 4000*l.* on attaining his majority, and his mother was unable to pay the whole of the premium required. Nevertheless, she was anxious to apprentice him to the plaintiff, who she rightly believed would be likely to advance his interests in life. It is quite true that it is an unusual thing for a master to sue his apprentice for any part of the premium which is to be paid to him; in most cases the master would sue the infant's father, or some other relative who had agreed to pay the premium. Then the question arises, whether an action can be maintained against an infant upon his covenant to pay a premium for his apprenticeship, and that, as it seems to me, is really determined by the passage which has been read from Coke upon Littleton, 172 (A). Lord Coke says that, "An infant may bind himself for his good teaching or instruction, whereby he may profit himself afterwards." I think that "teaching or instruction," though it includes instruction in a trade, is not necessarily confined to that. I should be sorry to conclude that literary instruction likely to lead to the infant's success in a learned profession is not within the observations of Lord Coke; the interests of the State require that an infant should be able to bind himself for instruction of that kind. Again, the language used by Lord Coke implies that an infant may be made responsible on a single obligation—that is, a bond without a penalty or a covenant given for necessaries—and this is the explanation given by Mr. Hargrave in his note, which is based upon two distinct authorities: *Pickering* v. *Jacobs* (1); *Russel* v. *Lee.* (2) It is quite true that in those cases the action was brought in respect of necessaries,

(1) March, 145. (2) 1 Lev. 86.

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such as food and clothing, supplied to the infant, and not for the cost of his education. But I think that education, which, whether it is or is not in strictness a necessary, is likely to lead to the future profit of the infant, falls within the same rule. In my opinion, it is really a necessary for an infant. This matter was discussed in *Pickering* v. *Gunning* (1), in which the question arose, whether an action could be maintained on a promise made by an infant to pay for his schooling, and the Court held that the action would lie. I have no doubt that the proper education of an infant stands in the same position under English law as food and clothing supplied to him. The authorities which I have mentioned are old ones, but, as the Master of the Rolls has already pointed out, there are more recent cases in all of which the old law is insisted upon and accepted as being the same as the modern law, and they all shew that an infant may bind himself by a single bond for necessaries or for his schooling. The only authority which can be cited as tending in the opposite direction is *Gylbert* v. *Fletcher* (2), which shews that a master cannot sue his apprentice upon his covenant to serve him entered into when he was an infant, and there is a subsequent case in equity to the same effect. The reason for this decision is not to be found in the decision itself, but I strongly suspect that it is founded upon two facts: first, that by the common law a master had a considerable power of correcting and castigating his apprentice; second, that by a very early statute jurisdiction was given to justices to enforce the performance of the contract of an infant apprentice to serve his master. Perhaps it was thought unnecessary to enforce the performance of the contract in any other way. These reasons do not apply to a covenant by an infant to pay a premium, and this is sufficient for the decision of the present case.

LOPES, L.J. I will content myself with saying that a careful investigation of the authorities satisfies me that the law is this —that an infant can be sued upon his single bond—that is, a bond without a penalty—given for necessaries supplied to him, provided it is shewn that the thing for the price of which the

(1) Palm. 528. (2) Cro. Car. 179.

action is brought was a necessary, and that the charge made for it was reasonable. I am satisfied that this is the true result of the authorities. I think they also establish that education may be a necessary for an infant. Whether it is, and whether the particular kind of education given is a necessary, is always a question for the jury; the position of the infant in life and his circumstances must be taken into consideration. In the present case the jury had to consider whether the particular kind of education which the plaintiff agreed to give the defendant was a necessary for him. They found that it was, and I must say that I should have formed the same opinion as the jury did. I will only add that our present decision does not in any way conflict with the cases in which it has been held that an action cannot be maintained for the breach of an infant's covenant to serve his master as an apprentice.

LORD ESHER, M.R. I in no way differ from what my brother Fry has said about education given to an infant, not for the purpose of qualifying him for a trade. I did not intend to exclude from the class of necessaries all education other than trade education.

Application refused.

Solicitors: *Torr & Co., for P. H. Senior, Nottingham; Page & Scorer, for W. T. Page, Lincoln.*

W. L. C.

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June 3.

[IN THE COURT OF APPEAL.]

THE LONDON BANK OF MEXICO AND SOUTH AMERICA, LIMITED *v.* APTHORPE.

Revenue—Income Tax—Trading Business carried on in England with Branches Abroad—Profits earned Abroad and not remitted to England—"Foreign Possessions"—Income Tax Acts, 5 *&* 6 *Vict. c.* 35, *s.* 100; 16 *&* 17 *Vict. c.* 34, *s.* 2, *Sched. D.*

A company, registered under the Joint Stock Companies Acts, carried on business as bankers in London, with branches abroad. The directors and shareholders met at the head office in London, where the business of bankers (other than that of current banking accounts) was carried on, and from whence the affairs of the company were directed and managed, the seat of power being in London with the directors. All usual banking business was conducted at the branches abroad by managers, subject to general directions and instructions for management issued by the head office in London. The company's dividends were paid in London, an adjustment of balances being from time to time made between the head office and the branches, and no special remittance of profits from the branches for the purpose of paying the dividends was ordinarily made. Of the profits earned at one of the branches in Mexico, a portion was not remitted to England, but was applied to paying, in Mexico, the consideration for certain rights and concessions purchased by the company from another bank in that country:—

Held (affirming the decision of the Queen's Bench Division), that, on the above facts, the company were liable to pay income tax under 16 & 17 Vict. c. 34, s. 2, Sched. D, in respect of the portion of the profits earned in Mexico and not remitted to England.

Colquhoun v. *Brooks* (14 App. Cas. 493) distinguished.

APPEAL from a judgment of the Queen's Bench Division (1) upon a case stated by the Commissioners of Income Tax, under 43 & 44 Vict. c. 19, s. 59.

At a meeting of the Commissioners for the general purposes of the Income Tax Acts for the City of London, the London Bank of Mexico and South America, Limited, appealed against an assessment of 4341*l.* 13*s.* 4*d.*, made upon them under Sched. D of 16 & 17 Vict. c. 34, s. 2, for the year ending April 5, 1889. The Commissioners confirmed the assessment subject to this case, which stated the following material facts:—

The London Bank of Mexico and South America, Limited, is a company registered under the Joint Stock Companies Acts,

(1) [1891] 1 Q. B. 383.

with its registered and head office at No. 144, Leadenhall Street, in the City of London. The directors and the shareholders meet at the company's office, and the affairs of the company are directed and managed therefrom. The details of the management of the branches are conducted by the managers of the several branches at those branches, general directions and instructions for management issuing or proceeding from the head office to the branches. The seat of power is in London, with the directors.

The company, prior to 1884, carried on, and has continued to carry on, the business of bankers in London, the City of Mexico, and the City of Lima. For that purpose they transact in London the London business of their branches, such as acceptance and payment of drafts and remittances of moneys, but not the business of current banking accounts. They transact at their branches all usual banking business.

By a law passed in the Republic of Mexico in 1884, the right of banks to issue and circulate notes was limited to such banks as had obtained, or within a limited time might obtain, the authorization of the Federal Executive. In 1884 the London Bank of Mexico and South America, Limited, had not obtained, nor did it within the limited time obtain, that authorization. On September 10, 1886, the bank entered into an agreement with another banking company in Mexico, called the Banco de Empleados, whereby the last-mentioned company ceded and transferred to the London company a concession granted by the Federal Government to the Banco de Empleados, including, amongst other things, the right of issuing notes. The agreement also contained provisions for the liquidation of the Banco de Empleados, and the London company was to take charge of the liquidation, and collect the debts. The net proceeds resulting from the collections, less 25 per cent., which was to be retained by the London company, were to be distributed in certain fixed proportions amongst the shareholders of the Banco de Empleados. By way of consideration for this transfer, the London company paid, out of their assets in Mexico, a sum amounting to nearly 20,000*l.*

The London company, in the return of their profits for the year ending April 5, 1889, claimed that the amount of the

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consideration paid as aforesaid should be brought into account in ascertaining the average of three years for the purposes of the assessment for income tax.

In the balance-sheet of the company for the year ending December, 1887, there is debited, as part of the annual expenditure of the company, 1000*l.*, by way of sinking fund, for the replacement of the consideration of 20,000*l.*

The actual cash received by the company in Great Britain does not include the whole of the sums which would have been so received had it not been for the transactions aforesaid, and the amount actually remitted and received is reduced by the deduction from the sums which would otherwise have been remitted of the amount of the payment of 20,000*l.* before mentioned. From time to time due and proper adjustment of balances is made between the head office and its branches, and the company's dividends are paid in London. It is not customary to make special remittance of profits from branches for purposes of dividend.

The Commissioners of Taxes on the above facts were of opinion that the amount paid as aforesaid was a payment on account of capital, and that the appellants were not entitled to claim the same or any part thereof by way of deduction from the amount of their profits for the purpose of calculating the amount assessable for income tax, and further that, as a registered company with its head office in the city of London, and on the above facts, they were properly assessed, and confirmed the assessment. (1)

(1) The 16 & 17 Vict. c. 34, s. 2, Sched. D, imposes income tax:—"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains."

By s. 5, the duties imposed by the statute are directed to be assessed under the regulations of 5 & 6 Vict. c. 35.

By 5 & 6 Vict. c. 35, s. 100, Sched. D:—"Fifth case.—The duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of Her Majesty's Dominions out of Great Britain, and foreign possessions.

"The duty to be charged in respect thereof shall be computed on a sum

The Queen's Bench Division confirmed the decision of the commissioners, and the London Bank of Mexico and South America now appealed from the judgment of the Queen's Bench Division.

Gainsford Bruce, Q.C. (*H. Tindal Atkinson*, with him), for the appellant company. The sum in question in this case was money earned by the appellant company in carrying on business abroad, and they are not liable to be assessed to the income tax in respect of profits earned abroad, unless and until those profits have been received by them in England. In *Colquhoun* v. *Brooks* (1), where a partner in a firm carrying on business in Australia resided in England, the House of Lords held that he was not liable to be assessed to the income tax in respect of any part of his share of the profits not received by him in England, because the case came under the head of "possessions in any of Her Majesty's dominions out of Great Britain, and foreign possessions," dealt with by the 5th case of Sched. D in 5 & 6 Vict. c. 35, s. 100. That decision is in point in the present case, in which it is sought to tax the appellant company in respect of profits earned by carrying on business in Mexico, no part of those profits having been received in England. The words of 16 & 17 Vict. c. 34, s. 2, Sched. D, must receive some limitation, otherwise, as was pointed out in *Colquhoun* v. *Brooks* (1), they would render liable to the income tax a foreigner who earned profits by a business which he wholly carried on abroad, if he happened to come into this country. It is submitted that the sum in question in the present case is a "foreign possession" within the 5th case of 5 & 6 Vict. c. 35, s. 100, Sched. D, and therefore that, being a sum made up of profits earned abroad and never received in this country, the appellant company is not liable to be assessed to the income tax in respect of it.

[He also referred to *Sulley* v. *Attorney General* (2); *Cesena Sulphur Co.* v. *Nicholson.* (3)]

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not less than the full amount of the actual sums annually received in Great Britain, &c."

(1) 21 Q. B. D. 52; 14 App. Cas. 493.

(2) 5 H. & N. 711.

(3) 1 Ex. D. 428.

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Sir R. Webster, A.-G., and *Danckwerts*, for the respondent, who was surveyor of taxes for the city of London, were not heard.

LORD ESHER, M.R. I am of opinion that this case is governed entirely by the principle of the decision in *Colquhoun* v. *Brooks*. (1) The person who is sought to be taxed in England may be a British subject. If he has a business which he carries on solely abroad—so that all he has done with regard to that business was done abroad—then he is not liable to pay income tax in England upon the profits or receipts of that business, except in respect of so much of them as come into his hands in England. I do not think it is necessary in this case to determine under what schedule he ought to be assessed in respect of the money which comes into his hands in this country. Where a person carries on two businesses—one which is carried on in England in the ordinary sense of the words, and another wholly distinct business which is carried on abroad—then you cannot join the two businesses, and charge him in respect of them, together. You must deal with the one in England only as a business carried on in England, and with the other as a business carried on solely abroad, and assess him in respect of each accordingly. As to the business carried on abroad, he can only be assessed in respect of so much money as he gets out of that business, and as comes into his hands in England. That is the result of the decision in *Colquhoun* v. *Brooks*. (1) In the present case the bank does not carry on two businesses. It is untrue to say that the business which they carry on is carried on in Mexico. They have only one business, which they carry on in England. It is true that part of the profits of that business carried on in England is earned by means of transactions abroad, but that is not carrying on the business abroad; it is carrying on the business in England by means of some transactions of it which are carried out abroad; but those transactions are carried out subject to the directions and at the will and pleasure of the masters and owners, resident in London, of that business. How are the profits of the business to be ascertained which are partly the result of the transactions abroad?

(1) 21 Q. B. D. 52; 14 App. Cas. 493.

They are to be ascertained by bringing into the account the transactions which earn money both abroad and in England, and setting against them the expenses of the business in England and the expenses of the agencies abroad, and determining here, in England, the difference between the two, and that difference represents the profits of that business so carried on in England. Therefore the profits cannot be got at except in England, and by dealing with all the transactions of that business carried on under the directions of the masters in England, although some of those transactions are carried on abroad. That is not a case of carrying on any business abroad. At all events, it is not a case of carrying on business solely abroad. There is only one business, and that is carried on in England. The banking company, therefore, are assessable in England on the profits of that business so carried on in England, to be calculated in the ordinary way of getting at the profits. The argument for the appellants really comes to this, that, if a merchant makes a sale abroad which will conduce to his profit in England, although his business is carried on in England, he is not to be assessed in respect of his estimated profits here in England until the money, the profit of the transaction performed abroad, comes to England. There is no such rule with regard to income tax, and I think that the judgment of the Court below was perfectly right; that this case is not brought within the case of *Colquhoun* v. *Brooks* (1), which the House of Lords held to be outside liability to the income tax. The appeal must be dismissed.

LOPES, L.J. In this case there are not two distinct businesses —one carried on in this country and the other carried on abroad —but there is only one business, and that business is carried on in this country. Directly so much as that is stated, the facts of this case are distinguishable from those in *Colquhoun* v. *Brooks* (1); but this case is governed by the principle enunciated in the House of Lords, and I think by this Court, in that case. I am of opinion, therefore, that the judgment of the Court below was right, and that this appeal should be dismissed.

(1) 21 Q. B. D. 52; 14 App. Cas. 493.

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KAY, L.J. The statute 16 & 17 Vict. c. 34, s. 2, sched. D, includes in plain and unmistakeable words the profits which are sought now to be exempted from the income tax. The decision of the House of Lords in *Colquhoun* v. *Brooks* (1) imported, under s. 5 of that Act, the provisions of the 5 & 6 Vict. c. 35, s. 100, exempting from the liability imposed by 16 & 17 Vict. c. 34, s. 2, sched. D, the case of a business carried on entirely abroad. Therefore the decision of that case certainly does not bind us here where the facts are wholly different. Here the business is carried on entirely in England, although some part of it is transacted, by the head office in England, in foreign countries.

Appeal dismissed.

Solicitors for the appellants: *Flux, Son & Co.*
Solicitor for the respondent: *The Solicitor of Inland Revenue.*

W. A.

June 12.

SPURLING, APPELLANT; BANTOFT (CLERK TO THE URBAN AUTHORITY OF THE BOROUGH OF IPSWICH), RESPONDENT.

Market—Disturbance—Liability to Penalty—Sale of Cattle—Lease by Corporation—Sale on Land Leased—Covenant for Quiet Enjoyment—Right to establish Market—"Prescribed Limits"—Markets and Fairs Clauses Act, 1847 (10 *&* 11 *Vict. c.* 14), *s.* 13—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 166.

The appellant, a cattle salesman, occupied premises, which he used for the sale of cattle, under leases granted by the corporation of a borough, containing covenants for quiet enjoyment. Afterwards the corporation, as the urban authority, established a cattle market in the borough, and published a list of tolls. The appellant was convicted for selling cattle, for which no toll had been paid, in his sale yard, within the borough, but not within the limits of the market.

On a case stated:—

Held, that the corporation had not derogated from their grant by establishing a market, that the appellant had not by virtue of the leases acquired any right to sell cattle within the meaning of s. 166 of the Public Health Act, 1875, which the urban authority could not interfere with by establishing a market, and was therefore liable to a penalty under s. 13 of the Markets and Fairs Clauses Act, 1847.

Held, also, that, by the use of the words "within their district" in s. 166 of

(1) 21 Q. B. D. 52; 14 App. Cas. 493.

the Public Health Act, 1875, the district of the urban authority was constituted "the prescribed limits" within the meaning of s. 13 of the Markets and Fairs Clauses Act, 1847.

Upon the argument of a special case only one counsel is heard on each side, except when the case is stated upon an order of sessions, when it is brought before the Court upon an order nisi to quash, and there all the counsel instructed on both sides may be heard.

CASE stated by justices.

The appellant was summarily convicted upon an information laid against him by the town clerk and clerk to the urban sanitary authority of the borough of Ipswich.

The charge laid in the information was, that the appellant, "on February 24 last, at the parish of St. Peter in the borough, after the market place was opened for public use in the borough, not then being a licensed hawker, unlawfully did sell and expose for sale in a certain place there known as Spurling's Sale Yard, within the limits of the borough (as defined by the Public Health Act, 1875, with which is incorporated the Markets and Fairs Clauses Act, 1847), but not within the market there established in pursuance of s. 166 of the first mentioned Act, and opened for public use within the limits aforesaid, and certified to be completed and fit for public use as prescribed by the Markets and Fairs Clauses Act, 1847, nor within his own dwelling-place or shop there, certain marketable articles—to wit, two bullocks—in respect of which tolls were by or in pursuance of the said Acts duly authorized to be taken in the market."

Upon the hearing of the information the following facts were proved or admitted:—

By an agreement for granting a building lease, dated November 9, 1846, the mayor, aldermen, and burgesses of the borough of Ipswich agreed to grant a lease or leases of some thirty acres of corporation land, situated within the borough, but on the outskirts of the town, to certain persons or their nominees upon the terms and conditions therein mentioned.

At that time, and subsequently down to the year 1856, cattle, sheep, and other animals were usually sold at weekly sales, upon land near the centre of the town of Ipswich, belonging to private individuals, who collected payments for such use of their land.

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In the year 1856 these sales were discontinued, and the mayor, aldermen, and burgesses erected pens and other accommodation upon land belonging to them and forming a more suitable site. This land is within the borough, and adjoins the thirty acres comprised in the agreement of November 9, 1846, but is divided therefrom by an intervening public highway.

From the year 1856 down to the year 1890 the site thus provided, which is now known as the Cattle Market, was used for the purposes of weekly sales, and the mayor, aldermen, and burgesses, or the tenant to whom they from time to time let the same, continued to collect certain charges from all persons using it as a market-place. During the greater part of this period sales of cattle were simultaneously held upon premises of the appellant by himself and his predecessors in title, and no payments were claimed by the corporation in respect of such sales.

By an indenture of lease dated June 15, 1864, and made in pursuance of the agreement of 1846, the mayor, aldermen, and burgesses leased to the late partner and predecessor in title of the appellant a piece of land, forming part of the thirty acres and fronting upon the highway, for a term of fifty-eight years from Michaelmas, 1863, at a yearly rent of 4*l.* 3*s.* 4*d.*, certain sums having been expended thereon, in the erection of good and substantial stables and other buildings, as in the lease recited, suitable for the appellant's business.

Prior to and at the commencement of the lease the appellant and his late partner were carrying on business on the premises so leased to them as general auctioneers and cattle salesmen, for which purpose alone the premises at that time were occupied by them, and from that time down to the present the appellant has occupied and he still occupies the premises for the purposes of his business of a general auctioneer and cattle salesman, and the premises are now known as Spurling's Sale Yard.

In December, 1867, and in November, 1868, the mayor, aldermen, and burgesses leased certain land, adjacent to the sale yard, but not forming any part of the thirty acres, subject to the agreement of 1846, to one George Philip Freeman, on the terms stated in the leases of these dates, part of such terms being that Freeman should pay to the lessors certain sums of money

for all horses, cattle, pigs, and sheep exhibited for sale or sold on the lands by the leases demised. In the year 1871, Freeman having become bankrupt, the mayor, aldermen, and burgesses sold to the appellant certain pens and other fixtures, which had belonged to Freeman and had been used by him for sales of cattle, and which pens and fixtures the appellant erected upon the land leased to him by the indenture of June 15, 1864.

By an indenture of lease, dated August 8, 1883, the mayor, aldermen, and burgesses leased to the appellant a further piece of land immediately adjoining the sale yard (but not forming part of the thirty acres comprised in the agreement of 1846), for a term of thirty-one years from Michaelmas, 1882, at a yearly rent of 10*l*, but the bullocks mentioned in the case were not sold upon the land leased by the last-mentioned indenture.

The sale yard and premises, upon which the appellant has expended upwards of 2000*l*., now consist of a brick-built counting-house or offices, facing the highway and overlooking the cattle market, and of an extensive yard, partly roofed in, but with open sides, fitted with pens and other appliances, covering a considerable area at the rear of the offices; all of which erections, by the terms of the lease, must be maintained and left for the mayor, aldermen, and burgesses of the borough of Ipswich at the expiration of the term. There is no building erected upon the premises other than the offices, and the same are used only in the daytime and for the purposes of the appellant in his business as an auctioneer. No person resides at or sleeps upon the premises, or ever has resided there.

On August 14, 1889, the mayor, aldermen, and burgesses, acting by the council as the Urban Sanitary Authority for the borough under the Public Health Act, 1875, resolved to establish a market under the provisions of such Act.

At a quarterly meeting of the council of the borough of Ipswich, duly convened and held on May 14, 1890, it was resolved as follows:—

"That a lease be granted to the urban sanitary authority of this borough of the cattle market place, horse sheds, cattle lairs, and premises, as now occupied by Mr. C. S. Orris, for the term of one year from June 24 next, at the rent of 305*l*., for

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the purposes of the market intended to be established by the urban sanitary authority. The authority to pay all rates and taxes, and to do all such repairs as may be necessary.

"That the council, as the Urban Sanitary Authority of this borough, take from the corporation a lease for one year of the cattle market and premises above mentioned at the rent of 305*l.*, for the purposes of a site for the market intended to be established by them."

On December 6, 1890, the Urban Sanitary Authority having expended a large sum in improving the site and equipments of the cattle market, and having duly advertised their intention so to do, and having obtained a certificate by two justices as to the completion and fitness for use of the market, duly opened the same as a cattle market for public use.

Since the opening of the cattle market, and previously thereto, all the statutory steps necessary to be taken have been duly taken for the establishment and regulation of the market, and the list of tolls and the bye-laws thereof have been duly made, sanctioned, exhibited, and published in accordance with the provisions of the Public Health Act, 1875, and the Markets and Fairs Clauses Act, 1847.

On February 24, 1891, being a market day, and the market being then open for use, the appellant sold at the portion of his sale yard included in the lease of 1864, within the limits of the borough, but not within the market, two bullocks.

Under the published list of tolls of the market, a toll is authorized to be taken in respect of each bullock using the market. No toll was paid in respect of the two bullocks.

The following documents were admitted and formed part of the case:—The leases of 1864 and 1883, together with the agreement of November 9, 1846. Also two indentures of lease, dated respectively December 27, 1867, and November 9, 1868, and made between the mayor, aldermen, and burgesses of Ipswich, and George Philip Freeman, the minutes of the meetings of the Town Council and the Urban Sanitary Authority of August 14, 1889, and May 14, 1890, and the reports of the Estates Committee, dated November 7, 1881, and May 10, 1890. The published schedule or list of tolls of the market.

The appellant contended that the conviction was wrong in law on the following grounds:—

That the appellant had rights and privileges within the proviso of s. 166 of the Public Health Act, 1875, with which the market established under that Act could not interfere.

That the corporation was precluded by the leases and the covenants therein contained, and by their conduct in relation to the letting of the land, from demanding in their capacity of Urban Sanitary Authority tolls or penalties in respect of sales conducted by the appellant on the land which is the sale yard in question.

That the corporation could not derogate from their own grants under the leases.

That the sale of the bullocks was effected by the appellant under his rights as lessee of the corporation, with which the establishment of the market did not interfere.

That the bullocks were not sold within the limits of the market and were not tollable.

The respondent contended that the appellant was properly convicted upon the grounds appearing by the premises.

The question for the opinion of the Court was whether the appellant was rightly convicted. (1)

(1) The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), provides for the establishment of markets. By s. 13: "After the market-place is open for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings."

By s. 2: "The expression 'the special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed authorizing the construction or regulation of a market or fair, and with which this Act shall be incorporated; and the word 'prescribed,' used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if instead of the word 'prescribed' the expression 'prescribed for that purpose in the special Act' had been used."

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166: . . . "Where the urban authority are a town council they shall have power, with the consent of two-thirds of their number, to do the following things, or any of them, within their district: To provide a market-place, and construct a market-house and

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Finlay, Q.C. (*Poyser*, with him) (1), for the appellant. No market has been legally established, and the appellant is exempted from liability to the penalty by the proviso in s. 166 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). The right to sell cattle had been granted to the appellant by the leases referred to in the case; and the corporation, having covenanted for quiet enjoyment, are not entitled to derogate from their own grant by establishing a market. There are in the present case no "prescribed limits," and therefore s. 13 of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), does not apply.

Lumley Smith, Q.C. (*Sherrington*, with him), for the respondents. The express covenants for quiet enjoyment exclude any implied covenant not to interfere with the appellant's business of selling cattle, and therefore it cannot be said that the respondents have covenanted to allow him to sell, or that they are seeking in any way to derogate from their own grant. If the corporation had, as the appellant contends, either expressly or impliedly covenanted not to interfere with his business by setting up a market, they would have acted ultra vires, for it is their duty, as the urban authority, to establish a market if they are of opinion that it is for the benefit of the town. Limits are prescribed by the words "within their district" in s. 166 of the Public Health Act, 1875, and therefore s. 13 of the Markets and Fairs Clauses Act, 1847, applies, and the appellant is liable to the penalty.

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other conveniences, for the purpose of holding markets; . . . To take stallages, rents and tolls in respect of the use by any person of such market; . . . But no market shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person without his consent."

Sect. 167 incorporates the provisions of 10 & 11 Vict. c. 14, as to markets.

(1) *Poyser* applied to be heard, citing the ruling of Cave and Charles, JJ., in *Proprietors of Birmingham Canal* v. *Hickman* (June 10, 1891), that more than one counsel was entitled to be heard, but the Court declined to hear him, and distinguished the case cited, on the ground that it came before the Court upon an order nisi, holding the practice to be as stated in Short's Crown Office Rules and Forms, ed. of 1886, p. 64, in the note to r. 147:—

"On the argument upon an order nisi, all the counsel instructed on both sides may be heard; but, upon a special case, only one counsel is heard on each side, except when the case is stated upon an order of sessions, when it is brought before the Court upon an order nisi to quash."

Finlay, Q.C., replied.

[The following cases were referred to in the course of the argument: *Line* v. *Stephenson* (1); *Shaw* v. *Stenton* (2); *Caswell* v. *Cook* (3); *Ellis* v. *Mayor, &c., of Bridgnorth* (4); *Dennett* v. *Atherton* (5); *Fearon* v. *Mitchell* (6); *In re Stapleford Colliery Co.; Barrow's Case* (7); *Bradlaugh* v. *Clarke* (8); *Robinson* v. *Kilvert.* (9)]

CAVE, J. My opinion has fluctuated somewhat during the course of the argument, but I have now come to a definite conclusion, and I do not think that anything is to be gained by taking further time to consider the case.

It is contended on behalf of the appellant that a market has not been legally established within the meaning of s. 166 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), because the appellant had a right to sell cattle, and had given no consent which could authorize the respondents to interfere with such right. The decision in *Fearon* v. *Mitchell* (6) settles that the right referred to in s. 166 must be a right in the nature of a franchise, which is not to be interfered with without the consent of the person entitled to it; and there is no franchise in the present case. But then it is contended that where a right, however qualified, is granted by a corporation, that corporation cannot afterwards interfere by setting up a market in derogation of their own grant. Two answers to this contention are suggested. First, that the corporation have not granted any right; that they have not contracted with the appellant that he is to be at liberty to carry on his business of selling cattle, and therefore have not in any way derogated from their grant. It is said on behalf of the respondents that there is an express covenant for quiet enjoyment, which does not cover the right claimed by the appellant, and therefore that no further covenant for quiet enjoyment can be implied. I give no opinion as to whether the

(1) 7 Scott, 69; 5 Bing. N. C. 183.
(2) 2 H. & N. 858; 27 L. J. (Ex.) 253.
(3) 11 C. B. (N.S.) 637; 31 L. J. (M.C.) 185.
(4) 2 J. & H. 67; 15 C. B. (N.S.) 52; 32 L. J. (C.P.) 273.
(5) Law Rep. 7 Q. B. 316.
(6) Law Rep. 7 Q. B. 690.
(7) 14 Ch. D. 432.
(8) 8 App. Cas. 354.
(9) 41 Ch. D. 88.

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express covenant would include the present case, or whether the appellant would be limited to the terms of the express covenant. Secondly, another point was made, which, in my opinion, affords a better answer to the appellant's contention. The strongest way of putting the appellant's case is to take it that the corporation covenanted that they would not establish a market. I think there is no ground for that contention as regards the lease of 1864, but the lease of 1883 may be alleged to have that effect. But supposing that to be so, the corporation can have no right to grant to the appellant an exclusive right to sell cattle. They could only covenant not to interfere with his business; and, if they did so, that would afford no answer to the appellant's liability. Power is given to the respondents, as the urban authority, by s. 166 of the Public Health Act, 1875, to establish a market; and they also happen to be the corporation. But this power is not given to them for their own benefit, but for the benefit of the public; and they are not at liberty to enter into any covenant to do something which may conflict with the public benefit, in order to get a better rent for their property. They can have no powers except such as are given to them by common law or by statute. The power now in question is given by statute, and it is given for the general welfare of the inhabitants of the borough. I do not think that the corporation were ever in a position to bind their successors by covenanting not to establish a market; for the urban sanitary authority would always be entitled to decide whether a market was required or not, and in so deciding they would be bound to be guided by the public advantage, and not by any considerations as to their own interest.

For these reasons, I am of opinion that the contention on behalf of the appellant fails, and that the respondents are entitled to judgment.

CHARLES, J. I am of the same opinion. I do not think that there is any right vested in the appellant within the meaning of s. 166 of the Public Health Act, 1875. *Fearon* v. *Mitchell* (1) establishes that such a right must be a right in the nature of a franchise. In that case Cockburn, C.J., said: "The word

(1) Law Rep. 7 Q. B. 690.

'rights,' especially when taken in conjunction with the words 'powers or privileges,' must mean rights acquired adversely to the rest of the world, and peculiar to the individual. Such a right having been acquired, it is but just that the statute should say that any powers exercised by the local authority under the section in setting up a market should not interfere with it; but it could never have been meant that the powers given for the benefit of the inhabitants of the particular district in setting up a market should not be exercised in consequence of some private individual or company having a business of the same description." (1) I cannot think that it makes any difference that the premises were leased in order that the appellant might sell cattle, if they were leased for that purpose. The urban authority could not be restrained from establishing a market because the premises had been leased to the appellant for the purpose of enabling him to sell cattle. The appellant is not within the proviso at the end of s. 166. I do not agree that any such grant as is contended for is established by the deed of 1864. That lease was based on the agreement of 1846, which bound the corporation to let the premises. The lease was executed in pursuance of that agreement. It is a building lease, and there is nothing in it about the sale of cattle. The covenant for quiet enjoyment does not help the appellant, because as Willes, J., pointed out in *Dennett* v. *Atherton* (2), it is only a covenant for the possession of the premises. But the deed of 1883 stands on a different footing, because that deed was executed for the purpose of enabling the appellant to sell cattle. But even so, I think that the judgment of Willes, J., in *Dennett* v. *Atherton* (2) covers the point. I think the effect of the covenant is not to guarantee to the appellant that he may at all times lawfully use the premises for the purpose of the sale of cattle. One other point remains to be noticed. Mr. Finlay raised the contention that there are in the present case no "prescribed limits," and therefore that s. 13 of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), does not apply. But I am of opinion that the limits are prescribed by the words contained in s. 166 of the Public Health

(1) Law Rep. 7 Q. B. at p. 696. (2) Law Rep. 7 Q. B. 316.

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Act, 1875, "within their district." I think the district of the urban authority is the limits prescribed by the Act.

CAVE, J. I agree as to that last point.

Judgment for respondents.

Solicitors for appellant: *Aldridge, Thorn & Co., for Jackaman, Sons & Kersey, Ipswich.*

Solicitor for respondent: *W. Bantoft, Town Clerk of Ipswich.*

P. B. H.

June 11, 17.

SMITH *v.* GRONOW.

Landlord and Tenant—Lease—Proviso for Forfeiture on Bankruptcy of Lessee or Assigns—Assignment of Lease—Subsequent Bankruptcy of Lessee.

In a lease of a house for a term of years there was a covenant by the lessee not to assign the premises without the consent in writing of the lessor, "such consent not to be withheld to a respectable and responsible tenant," and a proviso for re-entry if (inter alia) "the lessee, his executors, administrators or assigns should become bankrupt." The lessee assigned the lease, with the consent of the lessor, and subsequently to such assignment became bankrupt:—

Held, by Wright, J., that the proviso for re-entry referred only to the bankruptcy of the person who for the time being was possessed of the term, and that consequently no forfeiture had been incurred.

Quære, whether the right to enforce a forfeiture on the bankruptcy of the lessee is affected by an annulment of the bankruptcy.

TRIAL before Wright, J., without a jury.

The plaintiff in 1889 demised a house for a term of twenty-two years to one Duncan. The lease contained covenants by the lessee to pay the rent reserved and certain classes of taxes, to paint and to keep the premises in repair, and not to assign the premises without the consent in writing of the lessor, such consent not to be withheld to a respectable and responsible tenant. It also contained a proviso that "if the lessee, his executors, administrators or assigns shall become bankrupt . . . it shall be lawful for the lessor to re-enter . . . and after such re-entry this indenture and the term hereby granted and every clause herein contained shall cease and determine and be utterly void." In June, 1890, Duncan, with the consent of the plaintiff, assigned the lease and premises to the defendant. On

September 8, 1890, a receiving order was made against Duncan, and on September 10 he was adjudicated a bankrupt. The plaintiff thereupon claimed that by reason of Duncan's bankruptcy the term was determined, and on December 11 commenced an action against the defendant to recover possession of the premises. On March 24, 1891, while the action was pending, Duncan's bankruptcy was annulled.

F. Safford, for the plaintiff. Upon Duncan's bankruptcy the plaintiff was entitled to re-enter. A lessee does not cease to be a lessee by reason of his having assigned the lease. But if so, there is no reason why the proviso should not apply to the case of a lessee becoming bankrupt after assignment as well as to the case where he becomes bankrupt while stiH in possession of the premises, for the language of the proviso is general. A lessee remains liable upon his express covenants after assignment, and in the event of his bankruptcy, the lessor's remedy against him under the covenants would be confined to a right of proof against his estate. But if upon Duncan's bankruptcy the plaintiff was at liberty to treat the term as forfeited, he exercised his election so to treat it by bringing the action, and thereupon the term ceased. The subsequent annulment of the bankruptcy could not have the effect of reviving the term: *Smallcombe* v. *Olivier*. (1)

Boxall, for the defendant. The proviso only applies to the bankruptcy of the person who is tenant and who for the time being is possessed of or entitled to the premises. The origin of the proviso in its present form is pointed out by Platt, B., in *Doe d. Lloyd* v. *Ingleby*. (2) The form of proviso in old leases provided for forfeiture mainly in the event of an assignment without license, and the Courts held that that applied to voluntary assignments only, not to involuntary assignments by operation of law. And the object of the present form of proviso was "that the lessor should not have a new tenant of any kind or description, either by the voluntary or involuntary assignment of the lessee, forced upon him without his consent." But if that is the reason of the proviso, it has clearly no application here,

(1) 13 M. & W. 77. (2) 15 M. & W. 470.

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for Duncan had already assigned his estate, and there was consequently no possibility of his trustee being forced upon the plaintiff as his tenant. The relief against forfeitures conferred by the Conveyancing and Law of Property Act, 1881, does not extend to a forfeiture on the bankruptcy of the lessee, and the assignee, who may have paid a heavy premium, would, on the plaintiff's construction of the proviso, be liable to have his estate defeated by the act of persons over whom he had no control.

Cur. adv. vult.

June 17. WRIGHT, J. This is an action to recover possession of a house brought by the lessor against the assignee of the lease under these circumstances:—

The plaintiff in 1889 leased the premises to Mr. Duncan for twenty-two years. The lease contained a covenant by the lessee that he would not assign or part with possession of the premises or any part thereof without the consent in writing of the lessor, such consent not to be withheld to a respectable and responsible tenant. Then at the end of the lease comes the proviso that if at any time during the continuance of the term hereby granted the rent is not paid or the covenants are not performed, or if the said lessee, his executors, administrators or assigns shall become bankrupt or take the benefit of any Act for the relief of insolvent debtors, then and in either of such cases it shall be lawful for the lessor to enter upon the premises—to re-enter—and so forth, and the lease is to cease and be terminable and be utterly void. I think there are only two or three material facts. The lease having been given in 1889, there was granted in June, 1890, a licence to Duncan to assign to Gronow. On September 8, 1890, a receiving order was made against Duncan, and on the 10th Duncan was adjudicated a bankrupt. On December 11, the writ was issued in the present action against Gronow, but not against Duncan. Appearance was entered and the action was set down for trial, but in the meantime, namely, on March 24, 1891, Duncan's bankruptcy had been annulled, and the real and main question in the case here is whether under those circumstances Duncan's bankruptcy not having taken place till after

the assignment of the lease to Gronow, with the assent of the lessor, the lessor has power to re-enter as against Gronow on the ground of Duncan's bankruptcy. I am of opinion that the proviso refers only to the bankruptcy of the person holding the estate, that is, the bankruptcy of the lessee, his executors or administrators, if there has been no assignment, or if there has been an assignment, then the bankruptcy of the assign. After the assignment by the original lessee, Duncan, no privity of estate continued between the lessor and lessee. The only liability under which Duncan remained towards his lessor, was his contractual liability under his express covenants. The only right of the lessor which was endangered by the original lessee's bankruptcy after the assignment had taken place, was his right to enforce against the original lessee that contractual liability; and the power of re-entry in aid of that right, after assignment made, appears to me to be more than the subject-matter required, and more than ought to be understood in the absence of any words expressing an intention to apply that remedy for the protection of merely personal rights against a stranger to the term. Further, I think that the intention was that an approved assignee should take the same estate as that of his assignor. Upon the plaintiff's construction, the assignee, Gronow, would take a different estate and a more precarious one, because it would be determinable not merely on his own default, but also on the default of a stranger to the estate. Suppose the original lessee assigned part of the estate to one approved person, and the residue to another—on the plaintiff's construction, the bankruptcy of one of the assigns would give the lessor the right of re-entry on both parts of the estate. I do not think a construction involving such consequences ought to be adopted in the present case.

The other point is whether, if that opinion is wrong, the annulment of Duncan's bankruptcy destroys the plaintiff's right, taking into consideration that he brought his action for re-entry before the bankruptcy had been annulled. I do not think it necessary or right to determine the question. It is one of very great difficulty, and in the view I have taken, it is not necessary to determine it, and I think I have not before me all the materials necessary for a proper determination of it. In case,

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however, it would save the parties any trouble in the event of there being an appeal, I shall express my opinion to this extent, although I have not considered it so fully as I should have done had I taken a different view of the other matter: It seems to me that the bringing of this action by the lessor was an election made and notified to the assignee of the lessor's intention to re-enter, and that the annulment of the bankruptcy cannot defeat that election. There will be judgment for the defendant, with costs.

Judgment for defendant.

Solicitor for plaintiff: *G. Tooth.*
Solicitors for defendant: *Boxall & Boxall.*

J. F. C.

C. A.
June 29.

[IN THE COURT OF APPEAL.]

ALLDRED *v.* WEST METROPOLITAN TRAMS COMPANY.

Tramway Company—Liability for Damage from Non-repair of Road—Contract with Road Authority—Transfer of Liability—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, 55.

Where a tramway company has entered into a contract with the road authority under 33 & 34 Vict. c. 78, s. 29, whereby such authority has undertaken the repair of the portion of the road which under s. 128 the tramway company had to repair, the tramway company is not liable for injuries occasioned through non-repair of such portion of the road to a person using the same.

ACTION for personal injuries caused by the non-repair of the portion of a roadway adjoining the defendants' tramway.

The facts, as proved at the trial before Hawkins, J., with a jury, were as follows. The defendants were a tramway company, subject to the provisions of the Tramways Act, 1870 (33 & 34 Vict. c. 78). The paving of a highway, upon which the defendants' tramway was laid, being worn down close to one of the rails of the tramway, such rail stood up above the roadway. The wheel of a carriage which the plaintiff was driving in consequence skidded against the rail so that the carriage was upset and the plaintiff was injured. The defendants had entered into a contract, under s. 29 of the Tramways Act, 1870, with the road authority of the district, by which the latter undertook to main-

tain and repair the whole of the roadway outside the tram rails (which included the part out of repair), and to indemnify the company against all liability in respect of the non-repair thereof. The learned judge, on the authority of *Howitt* v. *Nottingham Tramways Company* (1), held that the defendants were not liable, and accordingly the judgment was entered for them. The plaintiff now moved for a new trial on the ground that the ruling of the learned judge was wrong (2).

McCall, Q.C. (*Guiry*, with him), for the plaintiff. Sect. 28 of the Tramways Act, 1870, throws upon the tramway company the obligation of keeping the portion of the road upon which the tramway is laid in good condition and repair to the satisfaction of the road authority, and a person injured through their failure to perform that obligation has a right of action against them. Sect. 29 enables them to make a contract with the road authority that the latter shall perform such repairs, a contract which would

(1) 12 Q. B. D. 16.

(2) The Tramways Act, 1870, provides, s. 28: The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway . . . and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway . . . provided always, that, if the promoters fail to comply with the provisions of this section, the road authority may themselves, at any time, after seven days' notice to the promoters, open and break up the road and do the works necessary for the repair and maintenance . . . of the road, to the extent in this section above mentioned, and the expense incurred by the road authority in so doing shall be repaid to them by the promoters.

Sect. 29: The road authority on the one hand, and the promoters on the other hand, may, from time to time enter into and carry into effect, and from time to time alter, renew, or vary contracts, agreements, or arrangements with respect to the paving and keeping in repair of the whole or any portion of the roadway of any road on which the promoters shall lay any tramway, and the proportion to be paid by either of them of the expense of such paving and keeping in repair.

Sect. 55: The promoters or lessees, as the case may be, shall be answerable for all accidents, damages, and injuries happening through their act or default, or through the act or default of any person in their employment by reason or in consequence of any of their works or carriages, and shall save harmless all road and other authorities, companies, or bodies, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages, and injuries.

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otherwise have been ultra vires; but such a contract does not affect their liability under s. 28 towards the general public.

[LORD ESHER, M.R. Is the liability imposed by s. 28 a liability towards the public? The repair is to be to the satisfaction of the road authority.

BOWEN, L.J. The company by s. 55 are to be answerable for accidents, damages, and injuries occasioned by their act or default. What default on their part is there in this case? Can it be said that they have failed to do what is imposed by the statute, viz., to keep the road in repair to the satisfaction of the road authority?]

It is submitted that the true construction of s. 28 is that the tramway company are to keep the roadway in "good condition and repair," as well as to the satisfaction of the road authority. The roadway being as it is, the rail becomes a nuisance to the highway, for which the tramway company are responsible. The statute cannot be taken to authorize them to maintain that which is a nuisance to the highway.

The words of s. 55 of the Act, which expressly provide that the tramway company shall save harmless all road authorities in respect of accidents, damages, and injuries, by reason or in consequence of their works and carriages, seem to shew that it was not contemplated that an agreement under s. 29 should exonerate the company.

[KAY, L.J. The 55th section says that the promoters are to be liable for their own acts or defaults, or those of persons in their employment. The road authority are not in their employment.]

The effect of s. 29 is merely to place the road authority in the position of contractors employed by a body liable to perform a statutory duty. *Howitt* v. *Nottingham Tramways Company* (1) is an authority against the plaintiff's contention; but the question whether that case was rightly decided was expressly left open by the Court of Appeal in *Steward* v. *North Metropolitan Tramways Company*. (2)

Kemp, Q.C., and *Atherley Jones*, for the defendants, were not called upon.

(1) 12 Q. B. D. 16. (2) 16 Q. B. D. 556.

Hohler appeared for the Vestry of Hammersmith (the road authority), who had been brought in as third parties.

LORD ESHER, M.R. The facts in this case are the same as in *Howitt* v. *Nottingham Tramways Company.* (1) We have, therefore, now to consider the question, which was not argued, and as to which I expressed no opinion, in *Steward* v. *North Metropolitan Tramways Company* (2), viz., whether the decision in *Howitt* v. *Nottingham Tramways Company* (1) was correct. The question in that case depended upon the true construction of the Tramways Act, 1870. The Court said that the provision of s. 28 of the Tramways Act, 1870, which provides that the promoters shall keep the portion of the road between the tramway rails and adjoining thereto in good condition and repair to the satisfaction of the road authority, imposes on the tramway company primâ facie a liability to any person injured by reason of such portion of the roadway not being kept in good condition and repair to the satisfaction of the road authority. I do not think that the view taken as to the primâ facie liability of the tramway company went further than that. But the Court then went on to say that s. 28 and s. 29 must be read together, and, assuming that s. 28 primâ facie throws on the tramway company the liability I have mentioned, yet, if under s. 29 a contract is made transferring the liability to repair to the road authority, the tramway company is not subject to any liability by reason of the road authority not doing what they have undertaken to do. The Court said that s. 29 must be read as a proviso to s. 28; that the liability of the promoters under s. 28 is only a primâ facie liability and is done away with if the liability is transferred to the road authority under s. 29. I agree with the view so taken. If it be not the true view, the tramway company would be placed in this position: they are authorized by the statute to make a contract by which the keeping of the roadway in good condition and repair in accordance with s. 28 is transferred to the road authority; if after the making of such a contract the liability of the tramway company continued, they would be liable for the acts or defaults of the road authority, though they would have no power

(1) 12 Q. B. D. 16. (2) 16 Q. B. D. 556.

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by reason of such contract to force that authority to do anything which they might think ought to be done, or not to do anything which they might think ought not to be done. The tramway company have no power over the road authority. The work is to be done to the satisfaction of the road authority, and it is so done. It seems to me impossible that the legislature can have intended that under those circumstances the liability should remain imposed upon the tramway company; and therefore, by necessary implication, it follows that the contract under s. 29 by which the road authority undertakes the repair of the road must have the effect given to it by the judgment of the Queen's Bench Division. It was argued that s. 55 prevented the Court from putting that construction upon ss. 28 and 29. It appears to me that that section is capable of being construed so as not to contradict what I have stated to be the true construction of the previous sections, and that it really does not at all affect that construction. I think that the reasoning of the Lord Chief Justice and Mathew, J., was right, and it is clearly applicable to this case. Therefore this case must be decided in the same way as *Howitt* v. *Nottingham Tramways Company* (1), and this application must be refused.

BOWEN, L.J., and KAY, L.J., concurred.

Application refused.

Solicitors for plaintiff: *Hewitt & Chapman.*
Solicitor for defendant: *H. C. Godfray.*
Solicitors for the third parties: *Watson, Sons, & Room.*

(1) 12 Q. B. D. 16.

E. L.

[IN THE COURT OF APPEAL.]

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June 29.

SMITH AND WIFE *v.* BAILEY AND ANOTHER.

Locomotive on Highway — Negligent Management of by Bailee—Liability of Owner of Traction Engine—Master and Servant—Locomotives Act, 1865 (28 & 29 *Vict. c.* 83), *ss.* 3, 7.

The defendant, who was the owner of a traction engine, to which his name and address were affixed, as required by the Locomotives Act, 1865, s. 7, let the same for three months. Through the negligent management of the engine whilst it was being used upon a highway by the hirer, personal injuries were occasioned to the plaintiff, who was being driven in a carriage upon the highway:—

Held, that the defendant was not liable in respect of such injuries.

Stables v. *Eley* (1 C. & P. 614), as reported, disapproved of.

ACTION in respect of personal injuries occasioned to the female plaintiff by the negligent management of a traction engine upon a highway.

At the trial, before Wills, J., with a jury, it appeared that the defendant Bailey was the owner of a traction engine, to which his name and address were affixed, as required by the Locomotives Act, 1865, s. 7. Through the negligent management of such engine upon a highway, the horses of a carriage, in which the female plaintiff was, were frightened, and, the carriage being overturned, she sustained injuries. At the time of the accident, which happened on August 26, 1890, the engine was under the management of one Greenstreet, who was likewise a defendant in the action. An agreement in writing, dated August 20, 1890, had been signed by Bailey and Greenstreet, whereby the former agreed to let and the latter to hire the engine and certain trucks for the period of three months from the date of such agreement, at a rent of 100*l*. The main question in dispute at the trial was whether or not, upon all the facts (1), this agreement was colourable, and the engine was really being worked at the time of the accident by Greenstreet as the agent or servant

(1) The facts as to that question are not set out, it being a mere question of fact, and the case being reported only on account of the view expressed by the Court as to the case of *Stables* v. *Eley* (1 C. & P. 614), and the contention under the Locomotives Act, 1865.

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of Bailey. The judge left to the jury the questions whether the agreement represented the real relations between Bailey and Greenstreet, and whether the engine was being worked by Greenstreet as the agent or servant of Bailey.

The jury found an answer in the affirmative to the former, and in the negative to the latter question, and they assessed the damages at 325*l.* The learned judge thereupon gave judgment for the plaintiffs against the defendant Greenstreet for 325*l.* and costs, and judgment against the plaintiffs for the defendant Bailey for his costs.

The plaintiffs now applied for a new trial on the ground that the verdict in favour of Bailey was against evidence, and on the ground that the learned judge misdirected, or insufficiently directed, the jury in refusing to direct them that the effect of the name and address of the defendant Bailey being affixed to the engine was conclusive evidence of his liability, and in not giving them any direction as to the liability of Bailey, as owner of the engine, under the Highways and Locomotives Acts, and in not explaining to them that, even assuming the letting out of the engine to Greenstreet, Bailey might nevertheless be liable for the acts of Greenstreet.

W. Wightman Wood, for the plaintiffs, contended, first, that the findings of the jury as to the effect of the agreement between Bailey and Greenstreet were against the evidence. Apart from that question, the defendant Bailey was responsible for the negligent management of the traction engine, and the judge should have so directed the jury. His name and address being affixed to the engine, as required by s. 7 of the Locomotives Act, 1865, he held himself out to the public as the person responsible for its management. In *Stables* v. *Eley* (1) it was held, in an action for the negligent driving of a cart, that, where the defendant had held himself out to the world as the owner of the cart by suffering his name to remain upon it, the action was maintainable against him in respect of the negligence of the driver, although he had ceased to be such owner.

[LORD ESHER, M.R. That case must be misreported.]

(1) 1 C. & P. 614.

The cases decided with regard to cabs, such as *Morley* v. *Dunscombe* (1) and *Powles* v. *Hider* (2), are analogous to the present case. In such cases it has been held that the owner of the cab was as regards the public to be treated as the master of the cab-driver, though in truth as between themselves their relation was not that of master and servant, but of bailor and bailee.

[LORD ESHER, M.R. Those cases turn on the construction placed upon the Hackney Carriage Acts: see *King* v. *London Improved Cab Company*. (3)]

It is contended that the legislation with regard to locomotives on highways is analogous to that with regard to hackney carriages. The legislature has treated these engines as dangerous machines, likely to cause mischief on highways, unless precautions are taken. The Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 3, lays down certain rules as to the management of such engines, and makes the owner liable to a penalty in case they are infringed. Then s. 7 of the Act provides that the name and address of the owner shall be affixed to the engine in a conspicuous manner. The general scope of the legislation is that, in the interests of the public using the highway, the owner of the engine shall be responsible, and that any member of the public may know whom to make responsible as such owner in the event of negligence in the management of the engine upon a highway. What is the good of the provision for information as to the owner's name and residence unless he is to be responsible?

[BOWEN, L.J. The provision of s. 7 was probably intended to assist any member of the public in finding out the person responsible, but it does not follow that the owner whose name and address are affixed is always to be responsible.]

Murphy, Q.C., and *Hohler*, for the defendant Bailey, were not called upon.

LORD ESHER, M.R. (after dealing with the question whether the verdict of the jury on the question of fact was against evidence, and holding that it was not, his Lordship proceeded as

(1) 11 L. T. (O.S.) 199. (2) 6 E. & B. 207.
(3) 23 Q. B. D. 281.

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follows:—) The case of *Stables* v. *Eley* (1) was then cited on behalf of the plaintiffs as authority for the proposition that, if a man allows a carriage to go out with his name upon it, he holds himself out as liable for injury occasioned by the negligence of any person driving it; and, according to the language used in the report, the decision does seem to go to the length of holding that in such a case there would be conclusive evidence of liability. But, if so, I think the decision was wrong, and I cannot agree with it. The case is mentioned in various text-books; but the comment upon it always appears to be that, if it is to be taken to go that length, it must be wrong, and it has been suggested that the utmost effect that could be given to the decision is that under such circumstances there would be primâ facie evidence of liability, which might be met, however, by shewing the truth of the matter. If the decision is to be taken as going any further than that, as I have said, I think it is wrong. If it really only went that length, it is not necessary upon the present occasion to say whether it is wrong or not. Then, with regard to the Locomotives Act, 1865, it was argued that, because it has been held on the construction of the Acts relating to hackney carriages that a cab-owner must be treated, so far as the public are concerned, as the master of the cab-driver, and as such responsible for his negligence, therefore we must put a similar construction on this Act. I do not think that the construction which has been placed on the Hackney Carriage Acts is any authority for the construction of this Act. Each Act must be construed according to its own language. I see nothing in this Act to shew that the legislature intended that, if a traction engine is let out and negligently used by the person to whom it is let, the owner of it shall be responsible to a person thereby injured. I think this application must be refused.

BOWEN, L.J. I am of the same opinion. I only wish to say that in my judgment the decision in *Stables* v. *Eley* (1) can only be justified on the supposition that the case has been misreported. The only possible explanation of the decision seems to be that suggested by the Master of the Rolls. It appears

(1) 1 C. & P. 614.

to me that the sooner the case disappears from the text-books the better.

KAY, L.J. I entirely agree, and will only add a word or two with regard to the Locomotives Act of 1865. As I understand the argument, reliance was placed upon s. 3, which provides that locomotives on highways shall be worked in accordance with certain rules and regulations, and, in the event of non-compliance with any of the provisions of the section, the owner of the locomotive shall be liable on summary conviction to a penalty not exceeding 10*l.* That provision would appear to deal with the case of an owner himself employing the locomotive; but, even if it goes further than that, it only imposes a liability to summary conviction, and a penalty not exceeding 10*l.* This is not the case of an action for penalties but for personal injury in which the damages recovered exceed 300*l.* Again, if s. 12 of the Act be looked at, it is plain, I think, that s. 3 only concerns the liability to summary conviction in the penalty of 10*l.*, for breach of the rules, because s. 12 says that "nothing in this Act contained shall authorize any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law, and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive." Therefore s. 12 says expressly that the Act shall not apply to the case of a person suing for damages for injuries arising from the use of a locomotive. It seems to me that s. 3 does not assist the plaintiff. The action here is founded upon the negligence of the person actually using the locomotive. He, as the jury have found, was not the servant or agent of the defendant, but a person who had hired the traction engine for a period of three months.

Application refused.

Solicitor for plaintiff: *C. MacColla.*
Solicitors for defendant: *Sharpe, Parker & Co.*

E. L.

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June 25.

[IN THE COURT OF APPEAL.]

THOMAS *v.* SEARLES AND ANOTHER.

Bill of Sale—"True Owner"—Bill of Sale by way of Security—Subsequent Bill of Sale of the same Goods—Statement of Consideration—Undisclosed Trust—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 8, 10, *sub-s.* 3—*Bills of Sale Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 5.

The grantor of chattels by a bill of sale by way of security is still the true owner of the chattels within the Bills of Sale Act, 1882, s. 5, and may execute a subsequent valid bill of sale of the same chattels.

Tuck v. *Southern Counties Deposit Bank* (42 Ch. D. 471) distinguished.

A debtor who owed a sum of money partly secured by an existing bill of sale, executed a second bill of sale of the same chattels to secure a fresh advance, on the understanding that out of the sum advanced he should pay off the existing debt. The bill of sale was expressed to be made in consideration of the fresh advance, without alluding to the intended application of the money. The money was actually paid to the grantor and applied by him as agreed:—

Held, first, that the consideration was truly stated, and secondly, that there was no undisclosed trust within the Bills of Sale Act, 1878, s. 10, sub-s. 3.

APPEAL from a judgment of A. L. Smith, J., on the trial of an interpleader issue in which the plaintiff, the grantee of a bill of sale, claimed certain goods which had been taken in execution at the suit of the defendants.

It appeared that Captain C. H. Hampden, the grantor, had for several years had money transactions with H. J. Thomas, the plaintiff in the interpleader issue, and on March 22, 1888, gave him a bill of sale of his furniture and effects as a security for an advance of money, subject to a defeasance on payment of what was due. On January 26, 1889, Captain Hampden gave the plaintiff another bill of sale of the same goods, which was expressed to be made in consideration of the sum of 290*l.* then paid by the plaintiff to Captain Hampden, by way of security for the payment of the said sum of 290*l.* and interest thereon at the rate of 5 per cent. per month; and it was agreed that the chattels thereby assigned should not be taken possession of by the plaintiff for any causes other than those specified in s. 7 of the Bills of Sale Act, 1882. Both these bills of sale were duly registered.

In June, 1889, an execution was levied on the goods comprised

in the bills of sale at the suit of the defendants. An interpleader summons was taken out by the sheriff, and an issue was directed to be tried between the plaintiff and the execution creditors. At the trial before A. L. Smith, J., without a jury, the following facts, respecting the circumstances under which the bill of sale of January 26, 1889, was executed, were proved. At that date Hampden owed a balance of about 178*l.* on the bill of sale of March 22, 1888, and was also indebted to the plaintiff in other sums on certain promissory notes, and he had asked for a further advance of 50*l.* Accordingly an arrangement was made between the plaintiff and Hampden that the latter should give the plaintiff a bill of sale for 290*l.* upon the goods comprised in the previous bill of sale, and that this sum should be advanced upon the understanding that Hampden should forthwith pay to the plaintiff the amount due to him on the subsisting securities, which amount was fixed at 235*l.* On the execution of the bill of sale the plaintiff gave Hampden two cheques for 240*l.* and 50*l.* respectively, which were duly honoured; and two days later the agreed sum of 235*l.* was paid by Hampden to the plaintiff.

At the trial of the issue the judge gave judgment for the plaintiff, and the defendants appealed.

Horace Kent, for the defendants. The bill of sale of January 26, 1889, was void as against the defendants on three grounds. In the first place, the grantor was not the true owner of the goods in the schedule to the bill of sale at the time of its execution. He had already assigned them to the plaintiff by the bill of sale of March, 1888. The second bill was therefore void as against all persons except the grantor under the Bills of Sale Act, 1882, s. 5. (1) Two days after its execution the former bill of sale was discharged by the payment off of the amount secured thereby; therefore the seizure of the goods by the sheriff was valid: *Tuck* v. *Southern Counties Deposit Bank.* (2)

[FRY, L.J. In that case the first bill of sale was an absolute

(1) 45 & 46 Vict. c. 43, s. 5: "Save as hereinafter mentioned a bill of sale shall be void except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale."

(2) 42 Ch. D. 471.

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assignment of the goods. Here the grantor had an equity of redemption. The Bills of Sale Act, 1878, s. 10, recognises the fact that there may be several bills of sale of the same chattels, and regulates their priority]

That section is inconsistent with the 5th section of the Act of 1882, and must be considered as repealed by it. A bill of sale in the scheduled form passes the entire property to the grantee: *Ex parte Stanford.* (1) It would be different if the creditor had only a lien, as in *Ex parte Barnett.* (2)

[LOPES, L.J., referred to *Ryall* v. *Rolle* (3) and *Cochrane* v. *Entwistle.* (4)]

In the second place, the consideration for the assignment is not truly stated in the bill of sale, in accordance with the Bills of Sale Act, 1878, s. 8. The real consideration was the agreement to repay the previous debt as well as the further advance of 50*l.* This ought to have been stated in the bill of sale. The real agreement between the parties, as to what is to be done as well as what is to be paid, ought to be set out: *Sharp* v. *McHenry.* (5)

In the third place, the bill of sale was made subject to a trust, which was not stated in the document; and the bill of sale is, therefore, void under the Bills of Sale Act, 1878, s. 10, sub-s. 3. (6) The agreement to dispose of the money advanced in a particular way constituted a trust which ought to have been disclosed.

Jelf, Q.C., and *Herbert Reed,* for the plaintiff, were not called on.

LINDLEY, L.J. This is an appeal from the judgment of A. L. Smith, J., on the trial of an interpleader issue. The appellants are execution creditors who have seized the goods of Captain

(1) 17 Q. B. D, at p. 273.
(2) 38 W. R. 351.
(3) 1 Atk., at p. 169.
(4) 25 Q. B. D. 116.
(5) 38 Ch. D. 427.
(6) 41 & 42 Vict. c. 31, s. 10, sub-s. 3: "If the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith, and as part thereof, otherwise the registration shall be void."

Hampden, and the plaintiff claims the goods under a bill of sale by Captain Hampden, dated January 26, 1889.

The appellants rely on three points. I will deal first with the last two points which were raised, as they are the most easily disposed of. In the first place, it was argued that the consideration was not truly stated in the bill of sale. The bill was expressed to be in consideration of the sum of 290*l.* then paid by Thomas to Hampden. The only question which the Court has to consider is, whether that sum was really paid or not. Unquestionably it was. Two cheques for 240*l.* and 50*l.* were given by Thomas to Hampden, and they were both paid by Thomas's bankers. Hampden got the money, and that was the consideration for the bill of sale. It was contended that that sum was not the consideration, because there was some agreement as to the subsequent application of the money. In my opinion, that had nothing to do with the question whether the consideration was truly stated.

The next point was that the bill of sale was subject to some undisclosed trust, which brought it within the prohibition in sub-s. 3 of s. 10 of the Bills of Sale Act, 1878. [The Lord Justice read the clause.] It was argued that there was an agreement at the time when the 290*l.* was paid that 235*l.* of it should be repaid by the borrower to the lender. There are two questions—first, did that agreement constitute a trust? and, secondly, if so, was it a trust within the meaning of the Act? It appears to me that that provision did not create a trust at all. It created a debt, and if the borrower had become bankrupt after the bill had been given and before the repayment, the lender's only remedy would have been to prove in the bankruptcy. That being so, it is unnecessary to consider whether a trust attaching to the money was a trust relating to the bill of sale within the section. I think the section means that the bill of sale must be subject to some trust by which the holder is bound, in order to come within the prohibition. In the present case the bill of sale was subject to no trust; this point, therefore, fails.

The remaining point, which was the first that was raised by the appellants, is more important. It was contended that it was impossible that there should be two bills of sale of the same chattels

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valid against any person except the grantor. That was a startling proposition, and, if it were well founded, the facilities for raising money by bills of sale would be enormously curtailed. Is there any ground for this contention? By s. 3 of the Bills of Sale Act, 1882, it is enacted that the Act of 1882, so far as is consistent with the tenor thereof, shall be construed as one with the Act of 1878; but by the Act of 1878 it is obvious that successive bills of sale of the same goods were contemplated, because in s. 10 of that Act there is a provision as to their priority. Under that Act it could not have been contended that there could not be two valid bills of sale of the same goods. Then is there any section in the Act of 1882 inconsistent with that? Sect. 5 was relied on. That section avoids a bill of sale except as against the grantor "in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale." Mr. Kent contended that the moment a man had given a bill of sale of his goods, he was no longer the true owner of those goods. But what is the position of a man who gives a bill of sale, not by way of absolute assignment, as in *Tuck* v. *Southern Counties Deposit Bank* (1), but by way of mortgage to secure an advance? He still has the equity of redemption in the goods. What is there to shew that he is not the true owner to the extent of that interest for the purpose of giving a fresh bill of sale as security for a further advance of money? It would be going too far to stretch the language of the section to make that impossible. I certainly am not prepared for the first time to put such an interpretation on the statute as would prevent a man from giving a second bill of sale on the same goods. The appeal entirely fails.

Appeal dismissed.

FRY and LOPES, L.JJ., concurred.

Solicitor for appellants: *S. S. Seal.*
Solicitor for respondent: *Cooper & Sons.*

(1) 42 Ch. D. 471.

M. W.

THE COUPÉ COMPANY v. MADDICK.

1891
June 5;
July 4.

Bailment—Bailor and Bailee—Bailee for Hire—Master and Servant—Liability of Bailee for Hire for Negligence of Servant.

The defendant hired a carriage and horse from the plaintiffs. The defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction. While he was thus engaged, the carriage and horse were injured, owing to his negligent driving:—

Held, that there had been a breach of the defendant's contract as bailee for which he was liable.

APPEAL from the Bloomsbury County Court. The action was brought by the plaintiffs, a company who let carriages and horses for hire, to recover damages from the defendant for injuries to a carriage and horse hired of them by him, arising from the negligence of the defendant's coachman. It appeared that the defendant was a surgeon, and that he hired the carriage and horse from the plaintiff company for a year at two guineas a week. On the afternoon in question the defendant returned home in the carriage, and told the coachman to take it to his stable, which was about 200 yards off. Instead of doing so, the coachman drove in another direction, and picked up a friend, whom he drove to a place about a mile and a half from the stable. While he was returning with his friend, the carriage and horse were run into by a cab and injured. The accident occurred about three-quarters of a mile from the stable, and the coachman was convicted of having been drunk at the time. The county court judge gave judgment for the defendant on the authority of *Storey* v. *Ashton*. (1) The plaintiffs appealed.

Moulton, Q.C. (with him *H. M. Sturges*), for the plaintiffs. The defendant is liable. Where goods are hired, the bailee contracts that reasonable care shall be taken of them. If, as here, reasonable care is not taken, and the hired articles are damaged in consequence, the bailee is liable for breach of contract.

W. Wills, for the defendant. The appeal should be dismissed. The obligation of the bailee to take reasonable care is, it is submitted, limited, so far as concerns his servants, to acts done by

(1) Law Rep. 4 Q. B. 476.

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them within the scope of their employment. If so, *Storey* v. *Ashton* (1) is a direct authority in the defendant's favour. It would seem from Sir W. Jones on Bailments (1st ed. p. 89) and Story on Bailments (8th ed. Boston, § 402), that this was the view taken by those text-writers. The law of bailment, as it affects the relation of banker and depositor, seems to have been so interpreted in the judgment of the Privy Council in *Giblin* v. *McMullen* (2), in which the American decision of *Foster* v. *Essex Bank* (3) is cited; and, in *Finucane* v. *Small* (4), Lord Kenyon held, apparently on the same principle, that where goods were stolen by the servants of a bailee, an action for negligence would not lie against him.

Moulton, Q.C., in reply. The defendant could not plead that he used reasonable care in the appointment of the servant who was negligent, and he can as little rely on the circumstance of the negligent act having been done in disobedience to his orders. There is no analogy between a claim arising out of the contract of bailment, and a claim by one of the public against a master for injuries arising from the tortious act of his servant. It is possible that the bailee may not be liable for the results of crimes committed by his servants, but he is as responsible to the bailor for their negligence as for his own: see per Coleridge, J., in *Dansey* v. *Richardson*. (5).

Cur. adv. vult.

July 4. The judgment of the Court (Cave and Charles, JJ.) was read by

CAVE, J. The question raised in this case is whether a person who has hired a horse and carriage for a year is responsible to the owner of the horse and carriage for damage done to them by the negligent driving of the hirer's servant, where the servant, instead of taking the horse and carriage to his master's stable in the ordinary course of his duty, for his own purposes and to serve a friend takes the horse and carriage in a contrary direction, and they are injured in consequence of his negligent driving while

(1) Law Rep. 4 Q. B. 476.
(2) Law Rep. 2 P. C. 317.
(3) 17 Massachusetts Reps. 479.
(4) 1 Esp. 315.
(5) 3 E. & B. 144, at p. 163.

thus engaged contrary to his duty. The county court judge held that the hirer was not responsible, on the authority of *Storey* v. *Ashton* (1), in which it was held, under similar circumstances, that the master was not liable to a person who had been run over and injured by the servant, on the ground that the servant was not acting in the course of his employment as servant. Mr. Wills, who argued for the defendant in this case, contended that the ground of the hirer's liability to the owner of the horse and carriage is the same as the ground of his liability to a person who is injured by the negligent act of his servant; but we are unable to agree with this contention.

When a wayfarer is injured by the negligence of a person who is driving a carriage along a highway, he has a right of action founded on tort against the driver, and, if the driver is a servant driving in the course of his employment, he has also a remedy against the master on the principle of respondeat superior; but, where a man hires a horse and carriage, there is an implied obligation on his part arising out of the contract to return them in the condition in which he received them, fair wear and tear and certain accidents excepted; and, if they are injured by the negligence of the hirer's servant while driving in the course of his employment, the letter's remedy is by action on the contract, and can be enforced against the hirer only and not against his servant. That there is a difference between the hirer's liability to the owner and his liability to a wayfarer injured by the negligence of the person driving the carriage is plain from the following instances. A. hires a horse and carriage for a year, and lends it for a day to B., who negligently drives over and injures C., at the same time injuring the horse and carriage. In that case A. is not responsible to C. because B. is not his servant, and consequently the maxim respondeat superior does not apply; but he is responsible to the owner of the horse and carriage for the damage done by B.'s negligence. So, again, if two partners hire a horse and cart for the purposes of their business, and one of them, while driving the cart in the usual course of their business, negligently runs against and injures a person passing along the highway and at the same time injures

(1) Law Rep. 4 Q. B. 476.

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CAVE, J.

the horse and cart, the partner driving is alone responsible to the person injured, but both partners are responsible to the person from whom they have hired the horse and cart. The responsibility of the hirer to the person from whom he hires is a responsibility arising out of contract, his responsibility to a person run over by the negligent driving of the horse and cart arises out of tort.

Is there any authority for saying that the responsibility of the hirer to take reasonable care of the goods hired does not extend to all injuries caused by the negligence of his servant to whom he has intrusted the care of them? Mr. Wills cited the cases of *Finucane* v. *Small* (1) and *Foster* v. *The Essex Bank* (2), in which it was held that the hirer was not responsible where his servant had stolen the goods hired. In those cases there was an act of the servant which was tortious as against the letter of the goods, and which gave him a right of action against the servant for a conversion of the goods. But in this case the act of the servant was not tortious as against the owner of the horse and carriage. If the horse and carriage had got back safely to the stables, the owner would have had no right of action against the servant; for, although the servant, as against his master, would have committed a breach of the duty arising out of the relationship of master and servant, he would not have been guilty of any tortious act as against the owner. Such an act would certainly not have amounted to a conversion of the horse and carriage by the servant, nor as against the owner would it have amounted to a trespass, seeing that the person who was entitled to the possession of the horse and carriage during the period occupied by the journey was the hirer, and not the owner. Nor could the fact that the horse and carriage were injured during the journey give the owner a cause of action against the servant, because it was not the owner who had intrusted the horse and carriage to the servant, but the hirer, his master, and consequently the duty of the servant to take care of them was a duty arising out of the relationship of master and servant, and owing to the master, and was not a duty owing to the owner, because there was no contractual relationship between the servant and the owner. The

(1) 1 Esp. 315.

(2) 17 Massachusetts Reps. 479, cited in *Giblin* v. *McMullen*, Law Rep. 2 P. C. 317.

hirer could maintain an action against the servant for breach of duty in the wrongful and negligent use of the horse and carriage by which they were damaged; but the owner could maintain no such action, because, as we have pointed out, there was no invasion by the servant of the latter's right of ownership, and no contractual relation between them.

If we consider the case on the general principles of the public benefit, we arrive at the same result. Where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is for the public advantage that the loss should fall in such a way as to diminish the probability of such a thing happening again, or, in other words, that it should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. If, under these circumstances, the loss is to fall on the owner who does not engage and cannot dismiss the servant, and who cannot recover over against him, the result is that it falls on one who could not have guarded beforehand against this accident, and who cannot prevent its recurrence, except by refusing to let out his horse and carriage in the future, which, so far from being a public benefit, is distinctly a public disadvantage, as tending to throw needless impediments in the way of business, and to render the letting and hiring of horses and carriages more expensive. If the loss is to fall on the hirer it falls on one who will thereby be led to exercise greater care in the selection of his servant, who can punish the servant for his misconduct by dismissing him, and who, theoretically at all events, has a right of action against the servant.

No case in point can be found on either side of the question; but, on the general considerations set out above, we are of opinion that the hirer is liable, and consequently we must allow the appeal and remit the case for re-trial, and the respondent must pay the costs of the appeal and such of the costs in the Court below as have been thrown away.

Appeal allowed; leave to appeal given.

Solicitor for plaintiffs: *Shaen, Roscoe, Massey & Co.*
Solicitors for defendant: *Greig, Meikle & Briggs.*

H D. W.

C. A.

1891
June 15;
July 21.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* LERESCHE AND ANOTHER, JUSTICES OF LANCASHIRE.

Husband and Wife—Desertion—Discontinuance of Cohabitation under Separation Deed—Offer to resume Cohabitation by Wife—Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 *Vict.* c. 52), s. 1.

A husband and wife were living apart under a separation deed, by which the husband covenanted to pay seven shillings a week to a trustee for the wife. The husband having ceased to make the payments required by the deed, the wife offered to resume cohabitation, but the husband refused to do so. The wife then applied to magistrates for an order upon the husband for maintenance under the Married Women (Maintenance in Case of Desertion) Act, 1886, and they made an order upon him for payment of seven shillings a week:—

Held, that, in order to constitute desertion within the Act, the parties must be living together as man and wife when the desertion takes place; that the husband's refusal of the wife's offer to resume cohabitation did not constitute desertion; and that there was therefore no evidence of desertion, and the order of the magistrates was wrong.

APPEAL from the decision of a Divisional Court (Day and Lawrance, JJ.), refusing to grant a rule nisi calling on magistrates to state a case for the opinion of the Court under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

The question upon which it was asked that a case should be stated was whether upon an application before magistrates by a wife against her husband under the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), there was any evidence of desertion by the husband.

The Court of Appeal had granted a rule nisi, which now came on for argument. The facts are fully stated in the judgment, and, for the purpose of rendering the arguments intelligible, sufficiently appear from the head-note. Counsel agreed on the argument that, in order to save expense, the Court of Appeal should decide the question of law with regard to which the case was required upon the facts appearing in the affidavits.

June 15. *Trevor White,* for the appellant, the husband. In order to constitute "desertion," there must be a withdrawal from an existing cohabitation. In the present case, as the husband

and wife were living apart under a separation deed, there could be no desertion. The offer of the wife to live again with the husband did not amount to a constructive resumption of the cohabitation. [He cited *Pape* v. *Pape* (1); *Fitzgerald* v. *Fitzgerald* (2); *Crabb* v. *Crabb*. (3)]

Atherley Jones, for the wife. The cases referred to for the appellant only shew that the wife cannot rely on the mere separation under an agreement for separation as per se constituting desertion. She cannot rely on that which was her own voluntary act as a desertion by her husband. This case is distinguishable, because the wife offered to resume cohabitation, and the husband refused to receive her; and therefore there was evidence upon which the magistrates might find as a fact that there was desertion, such as did not exist in those cases. [He cited *Keech* v. *Keech* (4); *Gatehouse* v. *Gatehouse* (5); *Dagg* v. *Dagg*. (6)]

Trevor White, in reply.

Cur. adv. vult.

July 21. The judgment of the Court (Lopes, L.J., and Kay, L.J.) was delivered by

LOPES, L.J. The question in this case is whether in the circumstances stated the husband deserted his wife within the meaning of 49 & 50 Vict. c. 52, s. 1.

The facts are as follows. The husband and wife agreed in 1890 to live apart, and a separation deed was executed reciting this agreement. The husband therein covenanted with the wife, and with a trustee in the usual way, that she might live apart, and that he would pay to the trustee 7*s*. a week for her separate use, and the trustee covenanted that she should not molest the husband. The husband after a time discontinued the payment of 7*s*. a week, and on January 12, 1891, an action was brought against him by the trustee for the arrears. He suffered judgment to go by default, but did not satisfy the judgment. A judgment summons was taken out, and the husband was ordered to pay the amount of the judgment by instalments. These instalments were not paid, and an order for commitment was made, execution of

(1) 20 Q. B. D. 76.
(2) Law Rep. 1 P. & D. 694.
(3) Law Rep. 1 P. & D. 601.
(4) Law Rep. 1 P. & D. 641.
(5) Law Rep. 1 P. & D. 331.
(6) 7 P. D. 17.

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Lopes, L.J.

which was suspended for a time. On April 6, 1891, the wife went to the husband's house and asked to be allowed to resume cohabitation with him. He refused, and would not admit her into the house. On April 24 she took out a summons before the magistrates at Manchester, under s. 1 of 49 & 50 Vict. c. 52, as a married woman "deserted by her husband" for maintenance. The magistrates ordered him to pay 7*s.* a week, and refused to state a case for the opinion of the Court under 20 & 21 Vict. c. 43, s. 4, and 42 & 43 Vict. c. 49. Application was made to the Divisional Court to grant a rule nisi calling upon the magistrates to state a case. The Divisional Court refused the rule, as I understand, on the ground that the question sought to be raised was not a question of law but a question of fact, in respect of which the decision of the justices was final and conclusive. There was then an appeal from the refusal of the Divisional Court to grant a rule nisi to this Court. This Court granted a rule nisi, and we are now asked to make that rule absolute.

I am of opinion that in this case a question of law did arise in respect of which the magistrates should have stated a case, and that the rule should be made absolute.

To avoid the scandal, expense, and delay which would arise in sending the matter back for the magistrates to state a case, which would go to the Divisional Court, and perhaps cause an appeal to this Court, counsel, at our suggestion, agreed to treat the facts which appeared in the affidavit of the magistrates as containing an accurate and sufficient statement of the facts, which should be regarded in all respects as if it were a case stated by the magistrates under 20 & 21 Vict. c. 43, s. 4, and 42 & 43 Vict. c. 49.

The question whether or not the wife has been deserted by the husband within the meaning of s. 1 of 49 & 50 Vict. c. 52, is, as a general rule, a question of fact for the justices to determine. A husband deserts his wife if he wilfully absents himself from the society of his wife in spite of her wish. Desertion may be inferred from certain acts in one case which in another would not justify the same inference. There must be a deliberate purpose of abandoning the conjugal society. Such abandonment need not be for any specified period. If a husband had quite recently

left his wife, stating that he did not intend to return, and was found living with another woman, this would be abundant evidence of desertion upon which the justices could act. To constitute desertion the parties must be living together as man and wife when the desertion takes place. As was said in *Fitzgerald* v. *Fitzgerald* (1), desertion implies an active withdrawal from a cohabitation that exists. This brings me to the case now before the Court. The husband and wife at the date of the alleged desertion were living apart under a separation deed. Cohabitation had ceased by mutual consent. It was, therefore, impossible that the husband could desert the wife. So far this case is governed by *Pape* v. *Pape* (2), with which decision I entirely agree.

But it is said that, assuming there was no desertion up to the time of the wife seeking to resume cohabitation, his refusal to again cohabit with his wife amounted to desertion or constructive desertion. It is clear cohabitation was not resumed. The husband unequivocally refused to cohabit, and would not allow his wife to enter the house. What, then, is the effect of the wife's offer and wish to resume cohabitation and the husband's refusal? The case of *Fitzgerald* v. *Fitzgerald* (3) answers this question. It is there said: "If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.'" I am of opinion, therefore, that the refusal of the husband to resume cohabitation did not amount to desertion within the statute in question.

It follows, therefore, that the decision of the magistrates was wrong.

Appeal allowed.

Solicitors for husband: *Chester & Co., for Lawson, Coppock & Co.*
Solicitors for wife: *Radford & Frankland, for Bowden & Walker.*

(1) Law Rep. 1 P. & D. 697. (2) 20 Q. B. D. 76.
(3) Law Rep. 1 P. & D. 694.

E. L.

C. A.
1891
July 21.

[IN THE COURT OF APPEAL.]

PELTON BROTHERS *v.* HARRISON.

Husband and Wife—Separate Estate of Wife—Restraint on Anticipation—Judgment against Wife—Liability after death of Husband—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 4.

A married woman, who had separate property subject to a restraint on anticipation, incurred a pecuniary liability. After the death of her husband she was sued, and judgment was recovered against her, limited to her separate property not subject to any restriction against anticipation. The execution creditor having obtained an order for a receiver of the income of such property:—

Held, affirming the judgment of the Queen's Bench Division, that the removal, by reason of the death of the husband, of the restraint on anticipation did not make the property liable, and that the order must be discharged.

APPEAL from a judgment of the Queen's Bench Division.

The following statement of facts is taken from the written judgment of the Court:—

A married woman incurred a pecuniary liability. At the time of incurring it she had separate property, as to some of which she was restrained from anticipation, but as to the rest, which was of substantial value, she was not. Her husband died in June, 1890. After his death she was sued upon the obligation contracted during the coverture, and judgment was obtained against her, which was drawn up in the form settled in *Scott* v. *Morley*. (1) "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant, such sum and costs to be paid out of her separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant not subject to any restraint on anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction."

Execution was issued against her property, which had been separate during the coverture, and as to which she was not restrained from anticipation, but she had incumbered it so that

(1) 20 Q. B. D. 120, at p. 132.

only about £16 was recovered. The execution creditor then obtained ex parte an order for a receiver of the property of the married woman as to which during the coverture she had been restrained from anticipation.

This order was discharged by Lawrance, J.; and an application to a Divisional Court to reverse his decision was dismissed with costs.

The execution creditor appealed.

June 16. *Horne Payne, Q.C.*, and *Gregson*, in support of the appeal. The Act intended to give the judgment creditor a right against any property of the judgment debtor with which, in the absence of any restraint on anticipation, she could deal. This was her separate property, and the restraint on anticipation being removed, it is available. The debtor might have property which, if she married again, would not be subject to restraint on anticipation; so that, unless the Act enables such property to be taken, the anomaly would present itself that though the creditor could not recover while the debtor was a widow he could if she married again.

Butcher, contrà. The first answer is that the form of the order precludes any proceeding by the execution creditors against this property, because when the obligation was incurred it was restrained from anticipation. Secondly, the Act only deals with separate property, which this is not. The Act does not extend an expression only applicable to married women's property to that of those who are not married. Thirdly, by s. 1, sub-s. 4, a married woman can only bind certain kinds of separate property, and this is not of that kind, as it was restrained from anticipation.

Horne Payne, Q.C., in reply.

1891. July 20. KAY, L.J. (after stating the facts as above set out, continued):—The question is whether under this judgment the property which the married woman was restrained from anticipating can be affected. The shortest answer is that the judgment expressly directs that there shall be no execution against such property, and in my opinion it is as completely excepted from the consequences of the judgment as if it had been

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specifically mentioned in it, and stated to be excepted because the married woman was restrained from anticipating it.

But we are invited to hold that this is not the meaning of that form of judgment, and that by the Married Woman's Property Act, 1882, it was intended to make liable property which could not be affected during the coverture by reason of the restraint on anticipation, if, by her surviving her husband, it becomes freed from that restraint.

In order to construe an Act of Parliament it was laid down long ago in *Heydon's Case* (1) that one of the most material things to consider is the state of the law before the Act, and the defect in that law which the Act was intended to remedy.

In 1881 the attention of the profession and the public had been called to the law with relation to the pecuniary obligations of married women by a decision of the Court of Appeal in *Pike* v. *Fitzgibbon.* (2) It was there held, reversing the judgment of Malins, V.-C., that the engagements of a married woman could only be enforced against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as might remain at the time when judgment was given against her; and that they could not be enforced against free separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements, but which she was restrained from anticipating. In short, it was held in that case that only the property which at the time of the engagements sued on she could have assigned or charged by writing under her hand could be made liable under a judgment against her.

In that state of the law the Married Women's Property Act, 1882, was passed. It relates to married women and to married women only. It does not relate to a woman who is not actually under coverture. It provides, s. 1, sub-s. 2, that a married woman shall be capable of entering into and rendering herself liable in respect of her separate property, and of sueing and being sued either in contract or in tort, or otherwise in all respects as if she were a feme sole, and her husband need not be joined, and any

(1) 3 Rep. 7 b. (2) 17 Ch. D. 454.

damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise. By sub-s. 4, "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

The property sought to be affected in this case was not acquired after the date of the engagement sued on, it was hers at that time, and it could not have been made liable during the coverture by reason of the restraint on anticipation.

The form of the judgment in *Scott* v. *Morley* (1) recognises what has never been disputed, that the statute makes no difference in this respect, but that property as to which she is restrained from anticipation, whether possessed by her at the time of the engagement or acquired afterwards, could not be made liable by any process: *Harrison* v. *Harrison.* (2)

But it is argued that when the husband died this property was still separate property, and that by the death of the husband the restraint on anticipation was gone, and it may therefore be treated as separate property acquired upon the death of the husband.

The answer to this argument is, that there is no such thing as separate property of an unmarried woman. Separate property means property held separately from the husband. The ordinary words of settlement are in trust for the wife "for her sole and separate use, independently of her husband and of his debts, control, and engagements," and the words "separate use" or "separate property" are merely a short mode of expressing the effect of that provision.

By s. 2 of the Act all property of a woman who marries after the date of it becomes upon her marriage her separate property. Therefore, if this argument were to prevail, it would follow that any property whatever acquired by a woman after the death of her husband since this Act would be her separate property, because it would become so if she should marry again; and, indeed, that the property of every unmarried woman is separate

(1) 20 Q. B. D. 120, at p. 132. (2) 13 P. D. 180.

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property because it will become so on her marriage. That is precisely the effect in equity of a trust for the separate use of a woman. Such a trust is completely inoperative while she is discovert, but it becomes effective the moment she marries, and continues so during any coverture or any number of successive covertures.

It may be argued that if this is so, it follows that the separate property of a married woman which might during the coverture be made liable for her engagements, as it ceases to be separate property upon her husband's death, could not be made liable after that event. In my opinion that does not follow. Such property, if according to the language of the Act the contract of the married woman did "bind" it during the coverture, could not become free from the possible obligation by its ceasing to be separate property on the death of her husband. It was property which the creditor could have attached during the coverture. His right or power of attaching it did not cease because it was no longer separate property. This was so held when the wife died before the husband and her free separate property devolved upon him. Judgment was given against him as her representative in the form settled in *Scott* v. *Morley* (1), partly because of the language of the Act that her contract bound that property, but also by reason of s. 23, which imposed upon her representative in respect of her separate estate the same liabilities as she would have had if living: *Surman* v. *Wharton.* (2)

The argument, however, was mainly founded on the judgment of the Court of Appeal in *Jay* v. *Robinson.* (3) A woman was divorced; after the divorce she became entitled to a chose in action. She married again in 1889. Without any settlement, under s. 2 of the Act, that chose in action would have become her separate property upon her second marriage. But by a deed of settlement in contemplation of the second marriage, that chose in action was settled in trust to pay the income thereof during the joint lives of the husband and wife to the wife for her separate use without power of anticipation. Subsequently, the

(1) 20 Q. B. D. 120, at p. 132. (2) [1891] 1 Q. B. 491.
(3) 25 Q. B. D. 467.

chose in action was reduced into possession by the payment of 5000*l.* to the trustees of the new settlement. A judgment had been recovered against her during her former coverture substantially in the form in *Scott* v. *Morley* (1), and the Court of Appeal, giving a liberal construction to s. 1, sub-s. 4, of the Act of 1882, held that "separate property which she may thereafter acquire," included separate property acquired upon a subsequent coverture, and a receiver was therefore appointed in respect of this 5000*l.*

There were two questions of difficulty in that case. (1.) Whether the obligation of the married woman contracted during the former coverture was a debt contracted before marriage within the meaning of ss. 13 and 19, or whether those words refer only to debts properly so-called, that is, debts contracted by an unmarried woman; and (2.) whether "separate property which she may thereafter acquire" includes separate property acquired during a second or other subsequent coverture. The Court of Appeal decided both these questions in favour of the creditor.

But that case did not decide that the 5000*l.* dealt with in it could have been attached under the judgment if she had not married again.

It is argued that unless it could, the law on this subject is in a very anomalous condition. But if it be so, that is a matter rather for the consideration of the legislature than of this Court.

If the argument in this case were to prevail, I do not see how to avoid the conclusion that all property acquired by a woman after the death of her husband, whether settled to her separate use or not, could be made liable under a judgment obtained against her before the death of her husband under this s. 1, sub-s. 4, of the statute, which does not profess to make liable anything except the "separate property" which a married woman may thereafter acquire. In my opinion, the mischief which this section of the Act was intended to remedy was that pointed out by the decision in *Pike* v. *Fitzgibbon* (2), where it was held that separate property acquired during coverture after the date of the engagement sued on, could not be reached under a judgment against the married woman. It was intended to

(1) 20 Q. B. D. 120, at p. 132. (2) 17 Ch. D. 454.

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make such after-acquired separate property liable to execution, but not any property acquired by her when not under coverture, nor any property, though separate property, as to which during coverture she was restrained from anticipation. It does not enable a married woman who has no separate property at the time to bind herself by a contract or engagement: *Palliser* v. *Gurney* (1), approved in *Stogdon* v. *Lee.* (2) Nor does it enable her if she has separate property to bind herself except in respect of that separate property and any other which she may thereafter acquire. The point was decided in the same way in *Beckett* v. *Tasker.* (3)

Lord Justice Lopes wishes me to say that he agrees with this judgment.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *W. T. Child, for J. S. Streeter, Croydon.*
Solicitors for defendant: *Mear & Fowler.*

A. M.

C. A.
July 1.

[IN THE COURT OF APPEAL.]

EX PARTE SCHOFIELD.

Practice—Appeal—Jurisdiction—Order for Abatement of Nuisance—Mandamus to Compel Magistrate to State Case—"Criminal Cause or Matter"—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 91, 96.

The Queen's Bench Division having refused to grant an order nisi for a mandamus to compel a stipendiary magistrate who had made an order, under s. 96 of the Public Health Act, 1875, for the abatement of a nuisance, to state a case for the opinion of the Court, the applicant moved, ex parte, by way of appeal from the Queen's Bench Division for an order nisi in the Court of Appeal:—

Held, that the decision of the Queen's Bench Division was given in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore that the Court of Appeal had no jurisdiction to entertain the application for a mandamus.

MOTION, ex parte, by way of appeal from the decision of the Queen's Bench Division, refusing an order nisi for a mandamus

(1) 19 Q. B. D. 519. (2) [1891] 1 Q. B. 661.
(3) 12 Q. B. D. 7.

to compel the stipendiary magistrate of Manchester to state a case for the opinion of the Court.

The applicant was summoned before the magistrate to answer a complaint made on behalf of the Town Council of the City of Manchester, for that he, the applicant, being the occupier of certain works in that city had suffered to exist, and continued, a nuisance upon his premises after due notice to abate the same, namely, a chimney sending forth black smoke in such a quantity as to be a nuisance, within the meaning of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91.

On the hearing of the complaint the magistrate made an order, under s. 96, for the abatement of the nuisance, and the payment by the applicant of a sum for costs, and refused to state a case.

Upon this motion coming on for hearing in the Court of Appeal, counsel for the applicant were asked by the Court to argue the preliminary question whether the decision of the Queen's Bench Division was not a decision in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, so that no appeal would lie from it.

Sir Horace Davey, Q.C. (*Joseph Walton*, with him), for the applicant. This is not a proceeding in a "criminal cause or matter," because its object is merely to compel the magistrate to state a case. If the application for a mandamus be granted, no question in issue before the magistrate on the hearing of the complaint will be determined thereby, and in that respect this case differs from *Reg.* v. *Whitchurch* (1), (where the application was for a certiorari to bring up, for the purpose of quashing, an order of justices), and from *Ex parte Woodhall* (2), where the appeal was from the decision of the Queen's Bench Division refusing an application for a writ of habeas corpus. It must be conceded after the decision in *Reg.* v. *Whitchurch* (1), that the proceeding before the magistrate was in a criminal cause or matter, but the appeal here is not against his order, but against the refusal of the Queen's Bench Division to compel him to

(1) 7 Q. B. D. 535. (2) 20 Q. B. D. 832.

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state a case, and the principle of the decision in *Reg.* v. *Holl* (1) should be applied.

[He also referred to *Cox* v. *Hakes.* (2)]

LORD ESHER, M.R. I am of opinion that we must stand by the decision of this Court in *Ex parte Woodhall* (3), and that it is conclusive upon the question now before us. This is an application, made ex parte, for a mandamus to compel the stipendiary magistrate to state a case for the opinion of the Queen's Bench Division in respect of a decision given by him in a matter arising under s. 91 of the Public Health Act, 1875. The Divisional Court have refused the application for a mandamus, and the objection is now taken by this Court that we have no jurisdiction to hear an appeal from their decision.

That the decision of the magistrate under s. 91 of the Public Health Act, 1875, was a proceeding in a criminal cause or matter cannot be doubted, but it is said that the application for a mandamus is not a proceeding in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, because the mandamus is only asked for to compel the magistrate to state a case, and therefore that the application has no legal effect upon the magistrate's determination of the question which was before him. He was asked to state a case upon a point of law arising in a criminal cause or matter. He refused, and we are asked for a mandamus to compel him to state a case. We are therefore asked to compel him to take a step in a proceeding in a criminal cause or matter which would have the effect of causing his decision to be reviewed. In *Ex parte Woodhall* (3), the Court of Appeal advisedly dealt with this question of jurisdiction generally. In my judgment I say, "We consider that we ought not any longer to flinch from determining whether we have, or have not, jurisdiction to hear an appeal in such a case as this, and we desire to rest our decision, not upon the facts of the particular case, but upon the determination of the question of jurisdiction." The Court, therefore, deliberately undertook to decide when there was, and when there was not, jurisdiction in

(1) 7 Q. B. D. 575. (2) 15 App. Cas. 506.
(3) 20 Q. B. D. 832.

such cases, and the judgment proceeds: "The result of all the decided cases is to shew that the words 'criminal cause or matter' in s. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes or matters;" and, at page 836 of the report, I say: "In the present case I think I must try to express my meaning in other words," i.e., other than had been used in previous cases. "I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises." In the case now before us, the appeal is against the refusal of the Divisional Court to grant a rule nisi for a mandamus to compel the stipendiary magistrate to state a case in a proceeding under s. 91 of the Public Health Act, 1875. Is that, or is it not, a decision by way of judicial determination of a question raised in or with regard to proceedings, the subject matter of which is criminal? I think that that refusal was such a decision, and that the question arose at the stage where the Queen's Bench Division refused the application for a mandamus. In *Ex parte Woodhall* (1) the Queen's Bench Division were asked to issue a writ of habeas corpus with respect to a person who had been committed to prison, under the Extradition Act, 1870, as a fugitive criminal accused of an extradition crime. I am of opinion that the case now before us comes directly within the words which I have read from the judgments in that case. In *Reg.* v. *Whitchurch* (2), the Queen's Bench Division made absolute a rule for a certiorari to bring up an order of justices made in a matter coming under s. 94 of the Public Health Act, 1875, and this Court held that the order was made in a criminal cause or matter within s. 47. The application in that case was made in order to bring up proceedings like these taken under the same Act of Parliament, the object of the application being to enable the Court to see whether the justices acted rightly or wrongly in deciding as they did, and this Court held that we

(1) 20 Q. B. D. 832. (2) 7 Q. B. D. 535.

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could not entertain an appeal against the decision of the Queen's Bench Division. Here the application is, not for a certiorari, but for a mandamus to compel the magistrate to state a case in order to have it determined whether his decision was right or wrong. I think that there is no real distinction between the two cases. The present case is, I think, covered by the reasoning in *Reg.* v. *Whitchurch* (1) and *Ex parte Woodhall.* (2) I am therefore of opinion that we have no jurisdiction to hear this appeal, and that it must be dismissed.

BOWEN, L.J. I am of the same opinion. That the proceeding before the magistrate was a proceeding in a criminal cause or matter has not been, and cannot be, seriously disputed. *Reg.* v. *Whitchurch* (1), places it beyond controversy. Then comes the question whether an appeal lies against the refusal of the Queen's Bench Division to grant a rule for a mandamus to compel the magistrate to state a case for the opinion of that Court. It seems to me that, if we decided that an appeal would lie, we should be opposing the whole current of authority on this subject.

The cases of *Reg.* v. *Steel* (3), *Reg.* v. *Fletcher* (4), and *Ex parte Woodhall* (2), run over a period of twelve years, and end with *Ex parte Woodhall* (2), the effect of which decision has just been stated by the Master of the Rolls. As he pointed out in that case, the intention of the legislature in enacting the latter part of s. 47 of the Judicature Act, 1873, was that the Court of Appeal should not interfere in the criminal matters of the country, that Court being constituted for the hearing of appeals in civil causes and matters only. We should be interfering with the proceedings in a criminal matter if we granted a mandamus to compel the magistrate to take a step in those proceedings.

KAY, L.J. A plain way of stating this case is:—The magistrate has made an order in a criminal matter, which order involved the decision of a point of law. The applicant for a mandamus desires to raise that point of law in the Queen's Bench

(1) 7 Q. B. D. 535.
(2) 20 Q. B. D. 832.
(3) 2 Q. B. D. 37.
(4) 2 Q. B. D. 43.

Division, and he can do so by obtaining from the Queen's Bench Division a mandamus to compel the magistrate to state a case. The point of law is the matter for the decision of the Queen's Bench Division. To take proceedings in order to compel the magistrate to state a case is really an endeavour to get his decision altered on a point of law, and to grant a mandamus to compel him to state a case is clearly a step in the proceedings in a criminal matter with respect to which the Judicature Act of 1873 has said there should be no appeal.

Appeal dismissed.

Solicitors for the applicant: *Collis & Mallam, for Cobbett, Wheeler & Cobbett, Manchester.*

W. A.

IN RE PROCTER.

July 2, 3

Bankruptcy—Disclaimer of Leaseholds—Estate under 300l.—Costs "payable out of the Estate"—Taxation on Lower Scale—Bankruptcy Rules, 1886, *r.* 112, *sub-s.* 2.

The costs of a trustee's application under s. 55 of the Bankruptcy Act, 1883, to disclaim leaseholds, are costs of a "proceeding under the Act" which, as a general rule, are payable out of the estate. Where, therefore, the assets are under 300*l.*, such costs are taxable on the lower scale pursuant to r. 112 (sub-s. 2) of the Bankruptcy Rules, 1886.

In re Dowson (21 Q. B. D. 417) distinguished.

THIS was an application to review a taxation of costs under the following circumstances.

A. W. Procter was adjudicated bankrupt in the Nottingham County Court, and R. Rhodes was appointed the trustee with a committee of inspection.

On July 12, 1889, the committee of inspection passed a resolution authorizing the trustee to disclaim certain leaseholds of the bankrupt, and to employ Mr. Day, a solicitor, for that purpose.

Notice of disclaimer was accordingly given, and the application was opposed by a mortgagee of the leaseholds.

On August 2, 1889, the county court judge granted leave to

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disclaim, and ordered that the costs of the trustee and of the mortgagee, of and incidental to the application, should be paid out of the estate of the bankrupt.

The costs of the mortgagee were taxed in the usual manner by the registrar of the county court at 5*l.* 6*s.* 6*d.*, and were paid in full without objection by the Board of Trade.

The costs of Mr. Day as solicitor to the trustee were in like manner taxed at 21*l.* 11*s.* 4*d.*, but the Board of Trade objected that these costs were taxable on the lower scale because, first, the estate was under 300*l.*; secondly, the costs were costs of proceedings under the Act and were payable out of the estate by virtue of the Act without an order of the Court; and caused the taxation to be reviewed by a bankruptcy taxing master of the High Court pursuant to r. 124 of the Bankruptcy Rules, 1886. The taxing master overruled the objection, being of opinion that, as the Court had a discretion in the matter and might have refused the trustee his costs out of the estate, the principle of *In re Dowson* (1) applied.

The matter was then referred to Cave, J.

Muir Mackenzie, for the Board of Trade. The application by the trustee under s. 55 of the Bankruptcy Act, 1883, was a proceeding under the Act, and the solicitor's bill of costs in relation thereto is taxable on the lower scale where the estate is under 300*l.*: Bankruptcy Rules, 1886, r. 112, sub-s. 2. It is the trustee who incurs the expense, and primâ facie his costs are payable out of the estate. The fact that the Court has a discretion in the matter and can disallow the trustee's costs does not prevent the operation of the rule. *In re Dowson* (1) is distinguishable. There the trustee had to pay the costs of third parties, which otherwise he would have had to pay personally.

Stevenson, for the solicitor. The rule was only intended to apply to costs directed by the Act and the rules to be paid out of the estate. These are not costs which as a matter of course are prescribed by the Act and the rules to be paid out of the estate. They are costs awarded by the order of the Court on an opposed motion. If no order had been made the trustee would

(1) 21 Q. B. D. 417.

not have got his costs out of the estate. The principle of *In re Dowson* (1) applies.

CAVE, J. I am of opinion that the contention on behalf of the Board of Trade should prevail. The 112th rule provides that where the bankrupt's assets do not exceed 300*l.*, a lower scale of costs shall be allowed "on all proceedings under the Act in which costs are payable out of the estate." Now, it seems to me that this is a case contemplated by that rule. It is a case in which the solicitor employed by the trustee would naturally look to the estate for payment of his costs, and would as a general rule get them out of the estate. I think the rule is clearly intended to apply to a solicitor who under the Act or rules is doing something for the benefit of the estate which will give him a right to have his costs paid out of the estate. The fact that the Court has a discretion to disallow costs which otherwise would be payable out of the estate does not, I think, prevent the application of the rule. The case of *In re Dowson* (1) does not apply. There the trustee was ordered to pay the costs of other parties and to recoup himself out of the estate. In this case I have no doubt that the rule applies.

Appeal allowed.

Solicitors: *R. Murton; Clinton & Co.*

(1) 21 Q. B. D. 417.

H. L. F.

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July 9.

[IN THE COURT OF APPEAL.]

ALLCHURCH AND ANOTHER, APPELLANTS; THE ASSESSMENT COMMITTEE AND THE GUARDIANS OF HENDON UNION, RESPONDENTS.

Poor-rate—Occupation of Part of a House—Rateable Hereditament—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 7, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5.

A house not structurally severed was let partly to one tenant and partly to another, and each had the exclusive occupation of the part let to him. There was a staircase leading from the front door to the upper rooms, and a joint user of the front garden and the back yard, in which was a closet. The tenants were jointly assessed in respect of the whole house, and rated as joint occupiers. The rate was confirmed by the respondents. On a case stated by quarter sessions:—

Held, affirming the judgment of the Queen's Bench Division, that the tenants could not be rated as joint occupiers, but that each was the occupier of a separate tenement capable of being rated, and each should be rated separately.

APPEAL from the judgment of the Queen's Bench Division on a case stated upon appeal from the quarter sessions of Middlesex.

A rate for the relief of the poor of the parish of Hendon was made, in which the appellants were jointly assessed and rated as joint occupiers of a house and yard, 2 Bellevue Road. The assessment was duly confirmed by the respondents.

The appellants appealed to the quarter sessions of Middlesex upon the grounds (among others) that they were jointly rated in respect of property which they did not occupy jointly, and in which they had no joint interest, and that each occupied a distinct portion of the premises as a separate hereditament.

The above-named house contained nine rooms, four being on the ground floor, and five on the first floor. The front door opened into a passage, which communicated with the ground floor rooms, and also, by means of an internal staircase, with the first floor rooms. There was a small garden in front of the house, and behind the house a yard in which was the only water-closet. The back yard and water-closet were reached from the ground floor by a door which opened into one of the ground floor rooms, and from the first floor by a door which opened into one of the

first floor rooms, from which there was a staircase. It was usual for the occupier of the upper floor to reach the street from the back yard without passing through the house. The house was supplied from one cistern which served both tenants, who could each draw water in his own kitchen independently of the other.

The house was let to the appellants, Allchurch and Parrott, as weekly tenants, each paying a weekly rent, having a separate letting, a separate rent-book, and a separate key. By arrangement the landlord paid the rates and taxes. Parrott had the exclusive use and occupation of the rooms on the ground floor, and Allchurch of the rooms on the first floor.

The back yard and water-closet were jointly used. By arrangement between the appellants the wife of Allchurch cleaned the internal staircase, and the wife of Parrott the passage on the ground floor. There was no bell to the front door, and by a mutual understanding one knock on the front door was answered by Parrott, and two knocks by Allchurch.

The first floor tenant usually used the back entrance by the outside staircase, but a person calling on either tenant usually came to the front door, and the letters for both were delivered there.

The landlord neither resided in, nor retained any control over, the house, nor rendered any services to the tenants. The ground floor tenant had the only key of the front door, and the first floor tenant had the only key of the door leading to the separate staircase.

The court of quarter sessions decided, in favour of the appellants, that each tenant was the sole and exclusive occupier of a separate tenement or hereditament capable of being rated, and that each tenant should have been separately rated in respect of his separate dwelling, and quashed the rate so far as it affected the appellants, subject to this case.

Staveley Hill, Q.C., and *Page*, for the assessment committee. These premises are one house only, and whether there is or is not a separate occupation of each floor is, for the purposes of this case, immaterial. The Representation of the People Act, 1867, and the Parliamentary and Municipal Registration Act, 1878, do

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not apply in any way to rating, but only to the right of franchise. The liability to be rated depends upon 43 Eliz. c. 2, and all the occupiers of one house are liable under that statute to be rated jointly.

These two floors are not separate dwelling-houses or tenements, for there is no structural severance: *Cook* v. *Humber*. (1)

Poland, Q.C. (*Bartley Denniss*, with him), for the appellants. These premises consist of two separate and distinct dwelling-houses, and each must be separately rated. If they are jointly rated, then one occupier will be liable to pay the whole rate, and to be distrained upon for the whole.

They are two separate rateable hereditaments, though there may be no structural severance: *Thompson* v. *Ward* (2); *Bradley* v. *Baylis*. (3)

[He was stopped by the Court.]

A. L. SMITH, J. This is an appeal upon a case stated by quarter sessions, and the facts are as follows: The house in question is built upon two floors, and is arranged for separate occupiers upon each floor: each floor has everything necessary for occupation, except a water-closet; the latter is outside the house, and is jointly used: there is a separate staircase leading from the outside to the upper floor: there is a door on the ground floor, and the occupier of that floor has the key: there is a staircase leading from the ground floor to the upper floor; by arrangement between the occupiers, the front door is sometimes used for some purposes of the occupier of the upper floor, and, apart from that, the occupation is entirely separate; if the staircase were closed, there would be an absolute structural separation. The question is whether these two distinct occupations ought to be rated separately, or can be rated together as one? In the rate-book of the Hendon Union they were rated in a lump, and the chairman of quarter sessions decided that they ought to be rated separately, and from that decision the union has appealed. It has been pointed out, if these premises are jointly rated, and there are two occupiers, the one might have to pay the rates of

(1) 11 C. B. (N.S.) 33. (2) Law Rep. 6 C. P. 327.
(3) 8 Q. B. D. 195.

the whole, and be liable to distress for the whole rates, which would undoubtedly be a great hardship.

It has been argued for the appellants that the Acts of 1867 (30 & 31 Vict. c. 102) and 1878 (41 & 42 Vict. c. 26) only affect the question of voting, and not of rating; but I cannot agree with that contention. The Act of 1867 confers the franchise upon occupiers of dwelling-houses, and enacts by s. 7, sub-s. 2, that "the full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book." That is an express enactment that every dwelling-house must be rated and entered in the rate-book. If, however, the provisions of s. 7 have not been extended, the appellants are right, for in s. 7 a dwelling-house means a whole house; but s. 61 provides that "'dwelling-house' shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor." Doubts, however, arose as to the meaning of that section, and many cases were decided which came to this—that if any part of a house was structurally separated from the other part, it was a dwelling-house within the meaning of the statute.

Then came the Act of 1878, which by s. 5, in my opinion, disposed of the questions raised in the previous decisions. That section enacted that "where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part." Therefore, a dwelling-house now includes any part of a dwelling-house which is separately occupied, whether there is or is not a joint occupation of some other part of the house. The argument of the appellants therefore fails. It is not necessary that there shall be an actual structural severance, but only that there shall be separate occupation of each part as a dwelling-house. That is my opinion upon the express enactments, apart from the authorities. Upon the authorities the result is the same. In *Kirby* v. *Biffin* (1), Denman, J., says: "The intention of the section (s. 5) is to enact that the occupation of a separate dwelling-house need

(1) 8 Q. B. D. 195, at p. 209.

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not be an occupation of every part occupied to the exclusion of every other person; but that the separate occupation of the qualifying part is sufficient, whatever may be the case as to the common use of the staircase, wash-house, &c."; and Jessel, M.R., in the Court of Appeal, says (p. 217): "The result, therefore, of these Acts, taken together, is that the householder (that is, the man who is entitled to be rated as a householder), who occupies a portion of a dwelling-house, which portion is capable of being rated or is rateable . . . is entitled to vote." Upon the statutes and upon the cases the decision of quarter sessions was correct, and this appeal must be dismissed.

GRANTHAM, J. Upon the cases decided before the Act of 1878, it is clear that there is in this case a sufficiently separate occupation to entitle the occupiers to be rated. It is said that this question of separate rating does not affect the right to be registered as a voter and to vote, but it might do so by reason of the proviso in s. 3 of the Act of 1867, and the provision as to separate occupation in s. 5 of the Act of 1878. If, therefore, this occupation was held to be joint, the occupiers might be deprived of the franchise. I base my judgment upon the facts of this case, from which it seems to me that, both originally and now, there were and are two separate dwelling-houses upon these premises. In *Thompson* v. *Ward* (1), Brett, J., says: "The interpretation at which I feel forced to arrive is that, although there need not be a structural separation, there must be a practical separation of the thing occupied from the rest of the house. The true construction seems to me to be, that the part of the house occupied by the inhabitant of it who claims to be registered, should be so situated in the house of which it is a part, and should be in such a condition, as to be capable of being used, and should be in fact used, as houses wholly separated from other houses are used by their inhabitants." That decision was long before the Act of 1878, and exactly describes the condition of this house. Therefore, according to the earlier decisions, and looking at the construction of this house, I am clearly of opinion that these two persons are entitled to be separately rated. In

(1) Law Rep. 6 C. P. 327, at p. 338.

any case, all possibility of doubt is removed by the Act of 1878, which removes any difficulty that might arise upon the facts of this case.

Appeal dismissed: leave to appeal.

W. A.

1891. July 9. The respondents appealed.

Staveley Hill, Q.C., and *Page*, in support of the appeal.
Lumley Smith, Q.C., and *Bartley Denniss*, contrà.

LORD ESHER, M.R. The argument in this case is clearly made to depend upon this, that because there is no structural division in this house therefore the occupation of each part of the house is to be treated as a joint occupation of the people who do, in fact, occupy separate parts of the house. Now, the phrase "structural severance" is not a phrase which has anything to do with occupation at all. It was a phrase invented by the judges at a time when in the statute of Elizabeth and in the Franchise Acts they were labouring to determine what was to be an occupation which in one case would give a liability to be rated, and in the other the right to the franchise. It was in use for a long time, and it had so far got into use that the legislature was obliged to deal with it, and the legislature has dealt with it, and has, in fact, done away with it, and has determined that when dealing with occupation as the foundation either for a right or for a liability, you must look to the occupation and see what it is that is occupied.

Now, apply that in this case. The question here is what is the occupation, because a person to be rated is a person who is occupying something. You are to look at his occupation. What do each of these people occupy? The one occupies rooms on the ground floor of a house and occupies them separately. It cannot be doubted that occupation is a separate one, because nobody else has any right to interfere with his occupation of that part. The other occupies another part of the house, and his occupation is a separate occupation, and nobody has a right to interfere with it. Therefore you have each of them occupying a separate part of something, whether it is a separate part of a house signifies not.

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If it were a field it would be a separate occupation of a part of a field. They are to be rated in respect of their occupation. How can each of them be rated as the occupier of something into which he has no right to go, in respect of which he has no beneficial right at all, in fact, in respect of something with which he has nothing to do, and with which if he attempts to do anything he is a trespasser? The occupation is as clearly separate as can be. It is a misuse of terms—not only a misuse but an untrue use of terms—to say that they jointly occupy this house. In the case of this house the landlord occupies no part of it unless it be the staircase. He has given up the whole occupation; he has given up his right to occupy some parts of it, at all events, to each tenant. He has given them no right to occupy it jointly. Taking it as I say, the question is really one of occupation, and you have got to find out what each man occupies. You find each man occupies a something which, whether you call it his house, or whatever you may call it, is a thing in respect of the occupation of which he is liable to be rated. If his occupation is a separate one he is separately occupying something in respect of which he is liable to be rated, and he, in respect of that separate occupation, must be the only person. So that the proper way of rating these people was to have rated each of them in respect of that separate part of the house, if you please to call it so, or of the thing which each separately occupies, which thing is not a chattel, but a thing which makes the person who occupies it liable for the rates. In that respect, therefore, the judgment of the Divisional Court is right, and this appeal must be dismissed.

It is said that this will give trouble to overseers. All I can say is, if it does, the overseers are bound by virtue of their office to take that trouble. They must not only look at the outside of a house, but they must go into the house, or inquire into the state of the house, and they must rate people according to their true and legal rights in respect of that which they occupy.

I am of opinion this appeal must be dismissed, and I say distinctly this whole matter of structural separation is an exploded phrase, and an exploded doctrine for all purposes whatever.

Lord Justice Bowen has just left the court, but he heard the

whole of the argument, and he agrees with me, and with the reason that I have given.

KAY, L.J. I also agree, and I must say I am glad that the conclusion seems to be inevitable, because any other would be productive of a very great injustice. To make the man who occupies the ground floor of this house liable for the rates of the first floor, the floor above it, upon which he cannot go without committing a trespass, would certainly be a very great injustice. In the same way, to make the occupier of the first floor liable for the rates of the ground floor, into no part of which he can go, except possibly the staircase, which leads to one of the outer doors, would be equally unjust. That they have a common use of that staircase, if they have such a common use, cannot make the occupation of one the occupation of another, so that each has the joint occupation of both the ground floor and the first floor. I entirely agree with what the Master of the Rolls has said.

Appeal dismissed.

Solicitor for the appellants: *Warburton & De Paula.*
Solicitors for the respondents: *D. R. Soames.*

A. M.

[IN THE COURT OF APPEAL.]

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April 15, 16 24; *July* 3.

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Copyright—International Copyright Act, 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Application of to Existing Works—Saving of Rights and Interests previously Acquired—Interests from or in connection with Lawful Production—Valuable Interests—Foreign Composer—Musical Work first produced in Foreign Country—Production of Work in England before operation of International Copyright Act,* 1886.

The International Copyright Act, 1886, by s. 6, provides that, upon an Order in Council being made, foreign composers shall be entitled to copyright in the United Kingdom in respect of works first produced before such order comes into operation, "provided that where any person has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

An Order in Council was made applying the Act to French subjects. The

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plaintiff, a French subject, had composed and first produced in France a musical composition called the 'Caprice Polka' before the order came into operation, but had not acquired copyright in the United Kingdom. Before the date of the publication of the order, an English publisher had printed and published this work in England, and the defendant, a bandmaster, had purchased a copy for 5s. for the use of his band, and had played it by his band both before and after such date. In an action for damages for the infringement of copyright and for an injunction:—

Held by the Court of Appeal, affirming the judgments of A. L. Smith and Grantham, JJ., that there was evidence to warrant the finding that the defendant had an interest arising from or in connection with the lawful production of the work in the United Kingdom, which was subsisting and valuable when the Order in Council was published, and that he was, therefore, protected by the proviso to s. 6.

APPEAL from decision of A. L. Smith and Grantham, JJ., affirming a judgment of the judge of the Brighton County Court.

The plaintiffs in this action claimed damages for an infringement of the plaintiff Mayeur's sole right of performance of a musical composition called the 'Caprice Polka,' and an injunction to restrain future infringement.

The plaintiff Mayeur, a French subject, composed a musical composition called the 'Caprice Polka,' which was an original work, and was first produced by him at Paris in November, 1877, and duly registered in France. The French copy bore on its face the words, "Tous droits d'execution et de production reservés." The copyright and sole right of performance, so far as France was concerned, was the property of Mayeur, everything having been done in France which was necessary according to French law to entitle Mayeur and his publishers to legal protection in France against infringement or illegal production. Mayeur took no steps to acquire the copyright or sole right of performance in England, pursuant to 7 & 8 Vict. c. 12, and the Order in Council made under that Act on January 10, 1852.

In March, 1887, an English publisher, named Lafleur, printed and published the musical composition 'Caprice Polka' in England, the music being arranged for a military band; this musical composition was identical with that composed and published by Mayeur.

The defendant, the bandmaster of the Brighton Pier Band, purchased a copy of the work published by Lafleur prior to

December 2, 1887, and performed the piece of music on the Brighton pier both before that date and after December 6, 1887. He only paid 5s. for the copy, but he bought it with the intention of performing it with his band, and it became prior to December 2, 1887, part of the stock in trade or repertoire of his band.

The International Copyright Act, 1886 (49 & 50 Vict. c. 33) (1), was passed in order that the Berne Convention of September 9, 1886, might be carried into effect in Her Majesty's dominions. An Order in Council was made under that Act on November 28, 1887, and published on December 2, 1887, by which the Act became applied, amongst others, to French subjects as from December 6, 1887.

The learned county court judge gave judgment for the defendant, and the plaintiffs appealed.

Asquith, Q.C., and *Rose Innes*, for the plaintiffs. The county court judge was wrong in his interpretation of the words "any rights or interests" in the proviso to s. 6 of the International Copyright Act, 1886. A "right" is something which a man enjoys exclusively of others, and not something which he enjoys jointly with all others; a "right" is not something the doing of which is not actionable, but something the violation of which by another is actionable. That is the meaning of "rights and interests" in this section, and in that sense neither Lafleur nor the defendant had any "rights or interests," for they acquired

(1) 49 & 50 Vict. c. 33, s. 6: "Where an Order in Council is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such order comes into operation shall be entitled to the same rights and remedies as if the said Acts and this Act and the said order had applied to the said foreign country at the date of the said production: Provided that where any person has before the date of the publication of an Order in Council lawfully produced any work in the United Kingdom nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

Sect. 11: "The expression 'literary and artistic work' means every . . . musical composition. . . . The expression 'produced' means, as the case requires, published or made, or, performed or represented, and the expression 'production' is to be construed accordingly."

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nothing which they could claim exclusively of others. The defendant had only a right or interest, if any, the same as any other member of the public; and, therefore, the only value of that which he had would be the amount he paid for his copy, if he had not already recouped himself. Such a right or interest would not be "valuable" within the meaning of the section, and would not "arise from or in connection with production." The cases contemplated by the proviso are such cases as an adaptation, arrangement, or translation of a foreign work, as to which the adapter or translator has obtained a copyright in this country, according to the law laid down in *Wood* v. *Boosey* (1) and *Fairlie* v. *Boosey*. (2)

Cutler, Q.C., and *Megone*, for the defendant. The defendant had a right or interest arising from or in connection with the lawful production of this work in the United Kingdom, which was valuable to him, and subsisting at the date of the publication of the Order in Council.

Asquith, Q.C., replied.

[Other points were raised as to the retrospective operation of the Act and the necessity of registration at Stationers' Hall by a foreigner, but as no judgment was given on these points, it is not considered necessary to report the arguments thereon.]

1891. April 24. A. L. SMITH, J. The plaintiff Mayeur claims damages for the infringement by the defendant of his sole right of performance of a musical composition called the 'Caprice Polka,' and an injunction. I omit the other plaintiff, for his joinder in no way affects the case. This is a test action to ascertain the true construction of s. 6 of the International Copyright Act of 1886, and what it applies to.

The learned county court judge sitting at Brighton found for the defendant. The question to be decided is, whether the foreign composer of a piece of music first produced in a foreign country, and protected according to the law of that country, but not protected in the United Kingdom, can claim the protection afforded to foreign composers by the International Copyright Act, 1886 (49 & 50 Vict. c. 33), as against

(1) Law Rep. 3 Q. B. 223. (2) 4 App. Cas. 711.

a bandmaster who had purchased such piece and performed it in public with his band in this country prior to and after December 2, 1887.

The plaintiff is a French subject, and in the year 1877 he composed and first produced in Paris a piece of music called the 'Caprice Polka,' and duly registered it in France, and obtained the protection of the Copyright Acts in that country. He did not protect it in this country. Ten years afterwards—viz., in March, 1887—an English publisher named Lafleur printed and published this polka in England. Prior to December 2, 1887, the defendant purchased of Lafleur a copy of this polka for the sum of 5*s.*, in order that it might be performed by his band, and he thereupon instructed his band in that behalf; and subsequently, both before and after December 2, 1887, played it by his band upon the pier at Brighton.

December 2, 1887, is the date of the publication of the Order in Council by which the International Copyright Act of 1886 became applied, amongst others, to French subjects.

The 6th section of this Act, upon the true construction and application of which this case hinges, when read in conjunction with the interpretation section (s. 11), as applied to this case, reads as follows:—"Where an Order in Council is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any musical composition first published or performed before the 2nd December, 1887, shall be entitled to the same rights and remedies as if the said Acts and this Act and the said order had applied to the said foreign country at the date of the said publication or performance: Provided that where any person has before the 2nd of December, 1887, lawfully published or performed any musical composition in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such publication and performance which are subsisting and valuable at the said date." It is not disputed that, apart from a point about the Act being retrospective, and a point about the non-registration of the piece by the plaintiff, the first part of this section—i.e., the protecting part—and s. 3 of the Order in Council applied to the plaintiff, and that he thereunder acquired

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the same copyright in his piece in the United Kingdom as if it had been first produced by him therein in 1877. The dispute is whether the defendant is within the exempting part of the section, viz., the proviso, so as not to be liable in the present action. It is obvious that the Act of 1886, whilst affording protection in this country to foreign authors of musical pieces composed and first performed in a foreign country, expressly intended to protect and preserve certain rights and interests subsisting in this country at the date when the Act applied. The question is what such protected rights and interests are. The proviso, it will be seen, includes Lafleur, for he lawfully published and sold the 'Caprice Polka' in the United Kingdom before December 2, 1887, and was, I understand, still then continuing to sell it; and it also includes the defendant, because he lawfully performed the polka by his band before that date, and was then still continuing to do so; but it is said that at that date neither Lafleur nor the defendant had "any rights or interests arising from or in connection with the publication or performance of the piece then subsisting and valuable." I agree with the interpretation Mr. Scrutton, in his excellent work upon copyright, places upon the words "lawfully published or performed," i.e., "without contravening any existing copyright." It is only as regards the defendant that I have to decide, but it is convenient, in the first place, to consider whether Lafleur, who printed and published the polka, had any rights or interests of value subsisting in the piece on December 2, 1887, and then to consider the case of the defendant. It appears to me that the legislature contemplated a distinction between the word "rights" and the word "interests," used in the disjunctive as they are, and, to understand what is meant thereby, it becomes important to remember the position of many authors and publishers in this country when the International Copyright Act was passed in 1886. By the International Copyright Act, 1844 (7 & 8 Vict. c. 12), s. 6, to entitle a foreign author to the copyright of a foreign work in this country, it must have been registered within a time to be prescribed by each Order in Council. In 1886 there existed many foreign works, copyright in their own country, which had no protection here, and in connection with such works English authors and

publishers were in the habit of bringing out reproductions with such additions or alterations as to give them a protection under the English Copyright Acts. In these cases the English translator or adapter, beside his right (in the popular sense) to reproduce in common with all mankind a work not copyright in England, had a right in the strict legal sense of the term under the English Copyright Acts, having obtained for his translation or adaptation protection thereunder. It is true he could not prevent other persons going to the foreign original for a similar purpose, but he could prevent them from saving themselves the trouble of translating or adapting by copying his work without going to the original. It is to this class of case, in my judgment, that the term "rights arising from or in connection with publication" applies, but it is not suggested that Lafleur had any such rights.

There also existed another class of case in which English publishers had bestowed no original labour on the foreign works they produced here, but had simply reproduced them as Lafleur had reproduced the polka in the present instance. In this class of case, in my judgment, the English publishers would not have acquired rights within the meaning of the proviso. It is true that they would have, popularly speaking, a right to reproduce the works, as had every one else, for no one could stop them; but though they had this right to produce, they would not, in my judgment, in the terms of the proviso, have any "rights arising from or in connection with their production." They had no further right on the day after they had produced the works than they had the day before, and I arrive at the conclusion that in this case neither Lafleur nor the defendant had any rights arising from or in connection with their publication or performance of the polka within the true reading of the proviso.

But had not Lafleur an interest arising from or in connection therewith? If the publisher of a work had invested capital in its production, and depended for the return of that capital upon the sale of copies in stock, or it may be upon the proceeds of a second edition, and was in such a position upon December 2, 1887, why, I ask, has he not an "interest arising from or in connection with the production of the work subsisting and valuable"

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upon December 2, 1887? In my judgment he has, and that it was to meet cases such as these that the word "interests" was inserted in the proviso in contradistinction to the word "rights." He has a direct subsisting pecuniary interest in the continuation of the production, or, in other words, in connection with the production; and s. 6 enacts that this interest is not to be diminished or prejudiced, which a foreigner would distinctly do if he could in such a case, by means of the Act of 1886, stop the further production of the work. This instance of a publisher by no means exhausts the examples which might be given as to whom the proviso would apply, but it suffices to accentuate the point now in hand. I hold, therefore, that Lafleur would have an interest within the true reading of the proviso, assuming that he was in the position suggested on December 2, 1887. Now comes the question as to the defendant. Why had not he, on December 2, 1887, an "interest arising from or in connection with the performance" of the polka then subsisting and of value? For the reasons above given, he had no "rights" within the proviso; but why not an interest? The learned county court judge held that there was evidence that he had an interest subsisting and of value. In my judgment there was evidence that he had an interest then subsisting, viz., an interest to recoup and to obtain a return for the outlay he had been put to in purchasing the piece, in training his band in its performance, and possibly in adapting it to different parts for his men, and that this interest was of value. Whether there be such an interest of value must in each case depend upon the facts of each case.

There is also another point, which is this: if all the bandsmen in the kingdom and all others are to be prevented from playing this polka, it might well be that Lafleur's interest in his unsold copies, if such there be, would be seriously affected, and it seems to me that this would also prevent this action from succeeding, if it were proved that Lafleur was in such a position on December 2, 1887. No evidence, however, was given upon this point in the county court, and I only allude to it to shew I have not overlooked it. For the reasons above given, in my opinion the learned county court judge was correct in his judgment when he

found for the defendant. Two other points were raised by the defendant, viz., that the plaintiffs could not maintain this action, first, because the Act of 1886 was not retrospective so as to include the French publication of 1877; and, secondly, because the plaintiff had not registered the polka in this kingdom under the Copyright Acts. Neither of these points were taken in the county court, and are not necessary for determination here. When, if ever, it becomes incumbent upon me to decide either of them, I will try to do so; but at present whatever I decided thereon would only be obiter, and I decline to entertain them. My judgment is that this appeal must be dismissed with costs.

GRANTHAM, J. The question in this case turns upon the construction of the 6th section of the International Copyright Act of 1886, and I am bound to admit it is a very difficult matter to construe. Mr. Asquith's argument on behalf of the appellant was a very powerful one; but, on the most careful consideration of the case, I have come to the conclusion that the respondent ought to succeed. Let us see what was the object of the section. It was the outcome of the Berne Convention, or, in other words, by this Act the statutable effect was given by the legislature of England to the wishes and desires of the literary and artistic people of the leading nations of Europe that there should be a reciprocity in protection given to authors of books or musical, dramatical, or artistic works in all these countries. As far, therefore, as England was concerned, foreigners who could bring themselves within s. 6 were for the first time entitled as of right to the same rights that English authors were entitled to, and they could prevent those rights being infringed. The foreign authors were not only to have these rights in the future, but to have the benefit of the Act applied retrospectively to all publications of theirs abroad, however long they may have been published before the date of this Act.

It was felt, however, that this last benefit so given to the foreigner might act with great injustice on Englishmen who had with perfect legality been printing, or selling, or performing the foreign author's works here, and the proviso in dispute was then inserted in this section, which runs thus:—[The learned judge

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read the proviso.] Just let us assume that it is a book which is the subject of dispute; an English printer has published a French book here, and has a number of copies still unsold. Are those copies to be wasted or not? In my judgment, not, and he would have the right of selling, and others would have the right of buying them, certainly until that edition was sold out. As far as his position is concerned, he occupies very much the same position pro tanto at least that he would occupy if he had printed and published a book written by an English author before that author had taken steps to secure his copyright. His interests, to say nothing of his rights in connection with or arising from the publication, would be subsisting and valuable. Next let us take the case of a manager of a theatre. He translates and produces on the stage a French comedy before the passing of the Act. Can it be said that he ought or was likely to be prejudiced by ex post facto legislation, and that, though perhaps only one or two performances had been given and none of the initial expenses of production recouped to him, yet he had no interests arising out of that production which were subsisting and valuable at the date of the coming into operation of the Order in Council giving the foreigner this new right? Next take the case of a composer or publisher of music who incurs considerable expense in printing some musical compositions for a band, and has only sold a few copies, and is dependent on the performance of the music by those who have already bought it to popularise the music and so sell the remainder of his edition. He was completely within his legal rights in the publication here of the music. Has he no interests in that publication which would be legal as against an English composer who had delayed the claim of and thus lost his copyright? And if he had as against him this right, he should have the same right as against the foreigner who for the first time was being treated in the same position as the home producer. If the publisher has this right why then has not the performer of the music the same right apparently reserved to him in the same spirit by this proviso? He might have spent days in teaching his band this music. He might have spent pounds where in this case shillings were spent in the purchase of the music, and he intended probably, as in this case, to continue the performance

to recoup himself for his outlay, and to enjoy the valuable interests he had in this music from its great popularity. Would it not be right to preserve his vested interests as well as those of the publisher of the book first mentioned, or the theatrical manager who prepared a French play for the English stage? For these reasons my judgment must be for the defendant, the respondent. Another question was raised on the question of registration, but as it does not properly arise in this case, I abstain from expressing an opinion upon it.

Appeal dismissed; leave to appeal granted.

J. R

The plaintiffs appealed.

Asquith, Q.C., Rose Innes, and *Roskill,* for the appellants, made use of the same arguments as were addressed to the Court below.

Cutler, Q.C., and *Megone,* for the respondent, were not called upon.

LINDLEY, L.J. This is an action of rather a singular character brought in the Brighton County Court by plaintiffs who are entitled to the exclusive right of publishing and performing a certain musical composition called the 'Caprice Polka.' The history of it is this: it was produced in France in November, 1877, and the plaintiff Mayeur, the author of it, duly registered it according to French law, and became entitled to all the rights which the French law could give him. He might have acquired an exclusive right in this country, if he had taken the necessary steps to do so by registering himself under 7 & 8 Vict. c. 12, but he did not do this; and in February, 1887, one Lafleur, an English publisher, published this piece of music in London, which he had the right to do. I do not now say whether it was a handsome thing to do or not, but according to law it was legal for him to do it. The defendant bought this piece of music from Lafleur and performed it with his band in London and Brighton during April and May, 1887, and did so again in 1888, 1889, and 1890. In the interval the International Copyright Act, 1886, had come into force as to French subjects under an Order in Council which came into operation upon December 6, 1887, and

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the questions we have to consider are what are the plaintiffs' rights, and what is the defendant's position having regard to the 6th section of that Act.

Now this is a county court case; it is not a rehearing. It is a case in which it is not competent for this Court to review the findings of fact, if there be any evidence in support of those findings, nor to draw any inferences of fact different from those drawn by the county court judge if there be any evidence to warrant the inferences he has drawn. I will read the section of 7 & 8 Vict. c. 12, and then read a portion of the judgment of the county court judge. The 6th section is divided into two portions, an enacting portion, and a proviso; the enacting portion relates to, and is in favour of the foreigner, and the proviso relates to, and is in favour of the Englishman. The enacting portion is this. [The Lord Justice then read the enacting portion, and continued:—] Stopping there for a moment, the section confers upon the plaintiff a right to sue in this country for any infringement of his rights after the date of December 6, 1887. Now comes the proviso which limits that, and it runs thus: "Where any person has before the date of the publication of an Order in Council lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from, or in connection with such production which are subsisting and valuable at the said date." We have to consider that, and see what protection, if any, that affords the defendant in this case. With respect to the word "produced," that is explained in s. 11.—"The expression 'produced' means, as the case requires, published, or made, or performed, or represented." The defendant says this: "At the date of this Order in Council" (the critical date as I understand being December 6, 1887), "I had a right or interest in performing this piece of music which was subsisting and valuable." The county court judge felt some difficulty about this question of value, and said, "I have come to the conclusion, not without some doubt, that the right, or interest, of the defendant to perform the 'Caprice Polka' was a valuable right within the meaning of the section." Therefore, unless we can say that there was no evidence to support that finding, we are bound by

it. A. L. Smith, J., deals with that in this way, he says: "The county court judge held that there was evidence that he had an interest subsisting and of value. In my judgment there was evidence that he had an interest subsisting, namely, an interest to recoup and to obtain the return for the outlay he had been put to in purchasing the piece, in training his band in its performance, and possibly in adapting it to the different parts for his men, and that this interest was of value."

Therefore the Divisional Court did not, and felt they could not, take the view that there was no evidence to support the finding of the county court judge. Neither the county court judge nor the Divisional Court express an opinion as to the amount of value; it may be small, but Mr. Asquith asks us to go further and say upon this evidence that the finding must be wrong, and that there was no evidence to support it. Now I am not prepared to go that length, and it appears to me it would be going a great deal too far. I threw out for Mr. Asquith's consideration the possible case of the sale by this bandmaster of the goodwill of his business, including the right to perform this piece of music with the rest: can I judicially say there could be no such thing? I cannot say anything of the kind. I daresay it may not be worth much, but can I say that there can be no value attaching to it? I am unable to go that length.

Then there is another point: this proviso is very curiously worded. It does not say that we are to regard only the defendant in a particular case, and consider his rights or his interest; but the proviso is put in this way, that "where *any person* has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any right or interest arising from" such production. Now does that mean necessarily rights or interests subsisting in the same person? I doubt that, and I turn to the observation made by A. L. Smith, J.; he says: "There is also another point, which is this: if all the bandsmen in the kingdom, and all others, are to be prevented from playing this polka, it might well be that Lafleur's interest in his unsold copies, if such there be, would be seriously affected, and it seems to me this would also prevent this action

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from succeeding, if it were proved that Lafleur was in such a position upon December 2, 1887." I am by no means satisfied that Lafleur's position can be left out of account. We have not enough evidence about him to make it safe to rest our decision upon his position. I merely wish to add that I concur with A. L. Smith, J., in thinking that the construction of the clause is by no means as clear as Mr. Asquith assumes. I base my judgment upon this, that I cannot say there was no evidence to shew that the defendants had a subsisting and valuable interest at the date in question. That disposes of the case; for it has been found that he had such an interest. The appeal must be dismissed, with costs.

FRY, L.J., and LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for the appellants: *Mann & Taylor.*
Solicitors for the defendants: *Thomas & Hick.*

W. W. K.

C. A.
July 7.

[IN THE COURT OF APPEAL.]

CLARKE *v.* RAMUZ.

Vendor and Purchaser—Sale of Land—Vendor in Possession, Trustee for Purchaser—Duty to preserve Land—Removal of Soil by Trespasser—Negligence—Claim after Completion.

Where a vendor under a contract for sale of land keeps possession until completion and payment of the purchase-money, he is in the position of a trustee for the purchaser, and bound as such to take reasonable care to preserve the property.

While a vendor so remained in possession, a trespasser without his authority or knowledge removed large quantities of surface soil from the property. A conveyance of the land was subsequently executed, and completion took place, neither party being then aware of the removal of soil:—

Held, that, notwithstanding the conveyance, the purchaser could maintain an action against the vendor for a breach of trust in taking no care to prevent such removal of the soil.

Phillips v. *Silvester* (Law Rep. 8 Ch. 173) followed.

ACTION by the purchaser of land against the vendor for, wrongfully, and in breach of his duty to the plaintiff under the contract

for sale of the land, suffering one Jackson to remove from the said land some hundreds of cartloads of soil.

At the trial before Grantham, J., with a jury, the facts appeared to be as follows: On August 2, 1889, the defendant entered into a contract for the sale to the plaintiff for 255*l.* of the fee simple of five small plots of building land situate at Southend. The property in question formed part of various lots sold by auction under the same conditions of sale. The date fixed by the contract for completion was August 12, 1889. By the conditions of sale it was provided that a purchaser who required a free conveyance, as thereinafter provided, should not be entitled to an abstract of title except on payment of a specified fee; and it was further provided that the contents and dimensions of the property as stated in the particulars should be taken to be correct, and no compensation should be required for any excess or deficiency in any of the quantities stated, and that no misdescription should annul the sale, nor should any compensation be allowed in respect thereof. On August 17 the defendant's solicitors wrote to the plaintiff reminding him that August 12 was the time fixed for completion, and asking him to name an early day for completion. On September 10 they again wrote reminding him that August 12 was the day for completion. On September 11 the plaintiff answered, asking for a free conveyance. On October 21, 1889, a conveyance of the land to the plaintiff was executed by the defendant, and the plaintiff then paid the balance of the purchase-money.

The defendant remained in possession of the land sold till completion. The defendant had employed one Jackson to make roads on his property adjoining the land sold to the plaintiff. Jackson, between September 11 and 30, 1889, without the knowledge of or any authority from the defendant, who lived at Herne Bay on the other side of the Thames, removed a large quantity of surface soil from the plots of land sold to the plaintiff, for the purpose of filling up a hole in a road being made by him on the defendant's land. At the time when completion took place neither the plaintiff nor the defendant knew that this had been done. The plaintiff did not find out that the soil had been removed till August or September, 1890. He then commenced

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the action. It seemed to have been assumed at the trial that the question was one of law for the judge, except so far as the amount of damages was concerned. The jury accordingly assessed the damages, and the judge gave judgment for the plaintiff for the amount found by them.

The defendant now moved for judgment or for a new trial, on the ground that the judge's ruling was erroneous.

Lumley Smith, Q.C., and *R. M. Bray*, for the defendant. It has been said that a vendor in possession after a contract for sale of land is a trustee for the purchaser; but, admitting that to be so to a certain extent, he is not absolutely responsible for the preservation of the land. He is only liable to make an allowance for deterioration of the property subsequently to the contract, which has been occasioned by his wilful acts or negligence; and he is not liable for deterioration after the time fixed for completion, if the title shewn were such that the purchaser ought to have taken possession: Dart's Vendors and Purchasers, 6th ed. pp. 284, 733, 734. The damage in this case was done after the time fixed for completion, and when the plaintiff might have taken possession if he had been ready to complete. The case of *Phillips* v. *Silvester* (1), which will be relied on for the plaintiff as an authority in his favour, is stated by Mr. Dart to have been disapproved of by the late Master of the Rolls, Sir George Jessel, as carrying the vendor's liability too far. There was nothing here in the nature of a wilful act by the defendant; and it is contended that he was guilty of no negligence or want of reasonable care. He is not liable as an insurer against trespasses on the land. There is no finding of negligence by the jury. If negligence is relied on, the question ought to have been left to them.

[BOWEN, L.J. We should not under the circumstances send this case down for a new trial on that point, if the necessary inference from the facts was that there was negligence.]

This was a small piece of vacant land unbuilt upon, and it would be unreasonable that the vendor, who lived at a distance, should be required to keep a person constantly on the land to

(1) Law Rep. 8 Ch. 173.

see that nobody trespassed upon or interfered with it. When a purchaser delays completion, it would be wholly unreasonable that the vendor should have to incur this expense.

[LORD COLERIDGE, C.J. He seems to have taken no care whatever to protect the land.]

They also cited on this point *Royal Bristol Permanent Building Society* v. *Bomash* (1); *Binks* v. *Lord Rokeby.* (2) Furthermore, it is contended that no such claim as this can be made after the execution of the conveyance. Assuming that an allowance of compensation in respect of such a matter could be made in a suit for specific performance, the conveyance finally closed the whole matter, and merged all the contractual obligations that existed under the executory contract for sale. It would be a most dangerous thing that matters of this kind should be allowed to be brought up as between vendor and purchaser, possibly long after completion, and after the whole matter was supposed to be closed. The cases clearly shew that there can be no compensation for misdescription or deficiency in quantity after completion, unless there is an express stipulation for it. The purchaser could have seen that the soil was removed before he took the conveyance. [They cited on this point *Bos* v. *Helsham* (3); *Joliffe* v. *Baker* (4); *Palmer* v. *Johnson* (5); *Rayner* v. *Preston.* (6)] The plaintiff's remedy was to bring an action against Jackson in the name of the defendant.

Jelf, Q.C., and *D. Stewart-Smith,* for the plaintiff, were not called upon.

LORD COLERIDGE, C.J. The contention is that such an action as this will not lie. It appears to be well established in equity that, in the case of a contract for the sale and purchase of land, although the legal property does not pass until the execution of the conveyance, during the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use

(1) 35 Ch. D. 390.
(2) 2 Sw. 222.
(3) Law Rep. 2 Ex. 72.
(4) 11 Q. B. D. 255.
(5) 13 Q. B. D. 351.
(6) 18 Ch. D. 1.

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reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made. Of course, where from any cause a long period of time elapses during which such possession of the vendor continues and deterioration of the property takes place, other considerations may come in; but in this case the injury complained of is the removal of a considerable portion of the soil for purposes for which the vendor had no right to allow such removal without the consent of the purchaser. The case of *Phillips* v. *Silvester* (1) is stated by Mr. Dart to have been commented upon by Jessel, M.R.; but the doctrine that the vendor in possession is under such circumstances a trustee for the purchaser appears to have been entirely acquiesced in by him in the subsequent case of *Earl of Egmont* v. *Smith.* (2) *Phillips* v. *Silvester* (1) is a decision with which we not only agree, but which is binding upon us. It lays down in clear terms under circumstances hardly distinguishable from those which exist in the present case, that there is such a duty as I have mentioned incumbent upon a vendor in possession after a contract for sale. If there is such a duty, it is clear in the present case that there has been a breach of it, because no care has been taken by the vendor to keep the property in the state in which it was when the contract was made. The counsel for the defendant were driven to contend that no care was under the circumstances reasonable care, a position which cannot possibly be supported. Then it was contended that by reason of the execution of the conveyance there was an end of any remedy for the breach of trust which had taken place, and which had lessened the value of the land. I could understand that, where the purchaser knew what had happened, it might possibly be argued that, by reason of his taking a conveyance without making any claim in respect of the breach of trust, there was evidence of a waiver by him of his right; but, where, as in this case, neither party, at the time when the conveyance was executed, knew anything about what had happened, I cannot see any ground whatever for the suggestion that the execution of the conveyance had the effect contended for by the defendant. It appears to me clear on

(1) Law Rep. 8 Ch. 173. (2) 6 Ch. D. 469.

principle, and upon the authority of the decision in *Phillips* v. *Silvester* (1), followed, as it has been, by Jessel, M.R., in *Earl of Egmont* v. *Smith* (2), and by Kekewich, J., in *Royal Bristol Permanent Building Society* v. *Bomash* (3), that this action is maintainable; and that, therefore, this application must be dismissed.

BOWEN, L.J. I am of the same opinion. It is clear that a vendor remaining in possession of the property after a contract for sale, as the defendant did, is bound to use some care to preserve the property, and here the defendant took no care. It was argued that this case was like those where it was a question of allowing compensation under the contract in respect of misdescription of the property, and matters of that kind, and that, when the conveyance was executed, there was an end of all remedy for the breach of trust. It is true that the execution of the conveyance puts an end to all contractual obligations which are intended to be satisfied by the execution of the conveyance. But that doctrine does not apply to cases where the contractual obligation is of such a kind that it cannot be supposed to have been the intention that it should be extinguished by the conveyance. Can it be said that the breach of an obligation arising between the making of the contract and the conveyance was intended to be satisfied by the execution of the conveyance? That must depend on the circumstances. One circumstance that must be material is whether the breach of duty in question was known to the parties. If it was, as in this case, unknown to them, it is impossible to suppose that they intended the conveyance to operate as a waiver or release.

KAY, L.J. I agree. In this case the purchaser has not got the whole of what he contracted to buy. If that has happened through no fault of his own, it would seem to be good sense that he should be able to say that he has not got what he bought, and therefore he claims compensation. If the vendor could shew that it was the purchaser's fault that he had not got what he

(1) Law Rep. 8 Ch. 173. (2) 6 Ch. D. 469.
(3) 35 Ch. D. 390.

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bargained for, that might be a good answer. But in the present case the purchaser says that, so far from its being his fault, he knew nothing about what was happening; and it was the fault of the vendor. The fact was that, after the contract and before completion, some one removed a large quantity of the surface soil; and the vendor not only did not prevent such removal, but he took no care to prevent it. I cannot doubt that that amounts to negligence on the part of the vendor, when I consider what the position of a vendor, situated as this vendor was, towards the purchaser has been held to be by the decisions. The cases of *Phillips* v. *Silvester* (1) and *Earl of Egmont* v. *Smith* (2) clearly establish the proposition that for some purposes the vendor in possession after a contract for sale of land is in the position of a trustee for the purchaser. He has certain duties towards the purchaser, one of which is—I am only putting into my own words what the decided cases have established—to take reasonable care that the property is not deteriorated in the interval before completion and while it is in his possession as such trustee. Here no such care was taken; and, therefore, there was a breach of the duty owed by the vendor to the purchaser. It was argued strenuously that, although the parties at that time knew nothing about what had happened, the fact of the purchaser's having taken a conveyance of the land deprives him of any remedy. The proposition must be that, though he had a remedy before he took the conveyance, because he took the conveyance without asserting his rights at that moment, he lost all remedy. I could understand that, if he took the conveyance with his eyes open, knowing what at the time the state of the property was, and did not make any claim, such conduct might—I do not say it would, but it might be argued that it would—amount to a waiver of his right. But that is not the present case; here the plaintiff knew nothing about what had happened. I cannot see any reason whatever why under these circumstances the conveyance should deprive him of the right which he had previously, but which he was ignorant of, and therefore could not have intended to waive. No authority has been cited in support of the proposition contended for, and I am glad to think that there

(1) Law Rep. 8 Ch. 173. (2) 6 Ch. D. 469.

is none. Another point argued was that this removal of soil happened after the time fixed for completion, and that there was a difference as regards the duty of the vendor towards the purchaser between the time before and that after the date fixed for completion. Certain dicta were referred to for the purpose of shewing this. But this was a contract under which it was plainly not the intention of either party that the purchaser should have possession until completion took place and the purchase-money was paid. It is rare for a contract for sale of land to give the purchaser a right to possession before completion; and, whenever that is intended, it is always expressed most explicitly. There is nothing in the terms of this contract which would give a right to possession before completion and payment of the purchase-money. Under these circumstances, it seems to me that there is no difference in this case, so far as the duty of the vendor is concerned, between the time before and the time after the date fixed for completion; and that his duty was as described until the purchase was completed. For these reasons, it appears to me that the action is maintainable.

Application refused.

Solicitor for plaintiff: *W. N. M. Scutts.*
Solicitor for defendant: *Charles R. Taylor.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
June 22;
July 21.

IN RE ONWARD BUILDING SOCIETY.

Company—Winding-up Order—Subsequent Transfer of Shares—Rectification of Register—Discretion—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 87, 98, 153.

In the case of a sale and transfer of shares in a company after a compulsory winding-up order, the transferee is not entitled to be registered as owner of the shares without the sanction of the Court: the Court has power to order the rectification of the register of members by the insertion of such transferee's name: but the exercise of that power is discretionary, and such an order ought not to be made except on strong grounds.

After an order had been made for compulsorily winding up a building society, a company called the Assets Realization Company bought up a number of shares in the society, which were transferred to their nominees. It appeared

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that there would be a surplus of assets in the winding-up; and one of the transferees applied for a rectification of the register by the insertion of his name as the owner of shares, with a view to obtaining the right to vote at meetings held in the winding-up. The Court refused the application on the ground that no sufficient reason was shewn for it.

APPEAL from Darlington County Court.

The Onward Building Society, incorporated under the Building Societies Act, 1874, being in financial difficulties, was, by order of the Darlington County Court, made March 19, 1890, ordered to be wound up in that Court, and by an order of April 12, 1890, an official liquidator was appointed. After the winding-up order, the Assets Realization Company bought a large number of the shares of the building society, the assets of which were considerable, and the shareholders had not to contribute more money to the society, but would receive back a part of the money they had invested. The assets company had paid about 13*s.* in the 1*l.* for the shares. They were transferred to some of the directors of that company, and, amongst others, to Mr. Broad, a person of substance and means, the transfer to him being made on November 4, 1890. He applied to the liquidator to register his name in the books of the society as transferee of the shares, but the application was refused; whereupon a motion on behalf of Mr. Broad was made in the county court under s. 35 of the Companies Act, 1862, that the liquidator might be ordered to enter the name. The liquidator opposed the motion on the ground that the society would be put to trouble and cost in registering such transfers, and that the order was unnecessary. The motion was refused.

The applicant now moved to reverse or vary the order of the county court, and that the liquidator might be ordered to enter on the register or other proper book kept by the society or the liquidator thereof a transfer dated November 4, 1890, to the applicant, and that his name might be entered in the ledger J, folio 12,439, or other proper book, in addition to or in substitution for that of the transferor, on the grounds—(1.) that the transfer was valid; (2.) that the applicant was entitled to have his name put on the books; (3.) that, if the granting or refusing of the application was a matter of discretion, the learned county court

judge exercised his discretion wrongly in refusing the application. (1)

Sir Henry James, Q.C., and *W. A. Meek*, for the applicant. The transferee of the shares in the society is a person whose name is without sufficient cause omitted from the register of members, and he is therefore entitled by s. 35 to an order that the register should be rectified. There is nothing in the Act to prohibit transfers after an order for winding-up, and no reason why they should not be registered: *Rudge* v. *Bowman*. (2)

Seward Brice, Q.C., and *W. Howland Jackson*, for the liquidator. There is no jurisdiction in the county court to order rectification of the register under the circumstances.

In *Ward and Henry's Case* (3), Lord Cairns, L.J., was of opinion that the jurisdiction given by the 35th section is confined to cases

(1) 25 & 26 Vict. c. 89 (The Companies Act, 1862), s. 35: "If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of Her Majesty's Superior Courts of law or equity, or by application to a judge sitting in chambers . . . . apply for an order of the Court that the register may be rectified; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion . . . ."

By s. 87, when an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose.

By s. 98, as soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of the Act.

By s. 153, where any company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the status of the members of the company made between the commencement of the winding-up and the order for winding-up, shall, unless the Court otherwise orders, be void.

(2) Law Rep. 3 Q. B. 689.

(3) Law Rep. 2 Ch. 431.

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where the register is incorrect through default of the company, and that where there had been no such default the Court had no authority to rectify the register. Turner, L.J., however, thought that the jurisdiction was not confined to such cases, but was discretionary. In *Reese River Silver Mining Co.* v. *Smith* (1), the register was rectified after a winding-up order; but the bill praying for the rectification was filed before the decree for winding-up. The House of Lords thought that s. 98 related back to s. 35 and gave power even after a winding-up order to correct an error in the register by striking out or inserting the name of a shareholder. In *Burgess's Case* (2), Jessel, M.R., held that a shareholder who had been induced by fraudulent misrepresentations to take shares in a company could not be relieved after winding up: *Rudge* v. *Bowman* (3), turned on s. 153, and had nothing to do with rectification of the register. There the plaintiff had sold shares after a winding-up order, and Blackburn, J., said (p. 693), "The transfer not being till after the order, the plaintiff would remain liable as a contributory, because the order fixes as contributories all who are members at the time it is made"; and in giving judgment (p. 696), "It is clear that subscribers to the memorandum of association and other persons who have agreed to become members are not complete members until they have been entered on the register of shareholders; but a transfer of shares may be registered at any time up to the time of the filing of a petition for winding-up."

[He referred also to *Emmerson's Case* (4).]

The fact of a company with large assets being wound up is unusual. Generally a winding-up order is followed by calls on contributories who are to be ascertained at the date of the order: s. 98.

Secondly, if there is a discretion, the Court has rightly declined to exercise it. Trouble, delay, and expense would be the result of making the order. It is undesirable to allow traffic in shares during winding-up.

Sir H. James, Q.C., and *Meek*, for applicant, in reply. Sect. 35 in express terms enables rectification to be ordered. It confers

(1) Law Rep. 4 H. L. 64.
(2) 15 Ch. D 507.
(3) Law Rep. 3 Q. B. 689.
(4) Law Rep. 1 Ch. 433.

a right on the shareholder. There is nothing in the condition of the company to take away that right.

Sect. 131, rendering transfers after winding-up void, applies only "whenever a company is wound up voluntarily." By s. 153 "where any company is being wound up by the Court or subject to the supervision of the Court, . . . every transfer of shares . . . made between the commencement of the winding-up and the order for winding-up, shall, unless the Court otherwise orders, be void." In a voluntary winding-up, where the shareholder may be taken to have agreed to the termination of the existence of the company, he may well be prevented from getting rid of his shares. But under s. 153 the leave of the Court for the transfer is needed only during the suspensory period between the commencement of the winding-up and the order. After the order the sanction of the Court is not required: *Rudge* v. *Bowman* (1) is directly in point.

The pleadings set out the same facts as in the present case, and Blackburn, J., said (p. 696), "Unless there is some clause in the statute to the contrary, I can see no reason why the transfer of shares should not be registered after a winding-up order has been made . . . As soon as the list of contributories is fixed, although no transfer can be made till after that, I see no objection in substance to a transfer of shares." In Buckley on the Companies Act (6th ed.), p. 100, the learned author, after having discussed the authorities and cited the judgment of Lord Cairns, L.J., in *Ward's Case* (2) says, "Reading, with the above judgment, the judgment of Lord Cairns in the House of Lords in *Reese River Silver Mining Co.* v. *Smith* (3), it is submitted that his Lordship's construction of this section amounts to this, that the jurisdiction in case of default or delay on the part of the company is clear; that there is also jurisdiction in any case of contest between an alleged shareholder and the company; but that, in case of a contest between two members or alleged members—in the case, in fact, of the application being practically one to enforce specific performance of a disputed contract between vendor and purchaser—the jurisdiction, if it exists at all, cannot

(1) Law Rep. 3 Q. B. 689. (2) Law Rep 2 Ch. 131.
(3) Law Rep 4 H. L. 64.

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be exercised in a case of complication and difficulty." That is the true canon. The present case stands apart from those in which two contending parties seek to have their claim decided. In an application against the company the contest between individuals cannot be introduced.

Secondly, there is no ground for exercising discretion adversely to the applicant. The society is solvent. The purchaser naturally wishes to have a voice in the management of the affairs. It is said that trouble might be caused to the liquidator; but he will have little or none, for he can be referred to the page and number of the name in the register, and can turn to it easily.

June 22. The judgment of the Court (Lord Coleridge, C.J., and Mathew, J.) was delivered by

MATHEW, J. This was an appeal from the decision of the County Court Judge of Darlington, who had refused an application for an order directing the liquidator of the Onward Building Society to place on the register of members the name of the appellant, Mr. Broad. The society had been ordered to be wound up compulsorily, and the question was whether Mr. Broad, who purchased shares after the date of the order, was entitled under s. 35 of the Companies Act, 1862, to have his name substituted on the register for that of his vendor.

Though the society had been unable to fulfil its engagements, the assets turned out to be more than sufficient to meet all liabilities, and it appeared that a considerable surplus would remain for distribution among the members. The applicant and others had made large purchases of shares, and were desirous of having their names placed on the list of members for the purpose of securing the most favourable realization of the assets, and of submitting, if necessary, their views to the Court, under s. 91 of the Act, upon any matter relating to the winding-up.

The learned county court judge refused to make an order under s. 35, on the ground that he had no jurisdiction.

Upon the argument before us it was contended that the statute did not prohibit dealing in shares after the winding-up order had been made by the Court; and it was urged that a buyer would not reap the full benefit of his contract if his name

did not appear on the register of members, and that under s. 35 he was entitled as of right to have the register rectified. The case of *Rudge* v. *Bowman* (1) was cited in support of the argument for the appellant.

On the other hand, it was argued for the liquidator that, although the statute contained no express provision on the subject, the intention of the legislature was clear that, after the order for winding-up by the Court had been made, the provisions of s. 35 did not enable a member to alter his status as a contributory.

It was not disputed that, under the peculiar circumstances of this case, the substitution of one name for another on the register would not prejudice the position of creditors. But it was pointed out that the case in which there were assets for distribution among contributories was altogether exceptional, and that as a general rule an order for winding-up involved the payment of calls which under the Act were intended to be borne by those who were liable to be placed on the list of contributories at the date of the order. Thus s. 98 provides, as the first duty of the Court after the order for winding-up, that a list of contributories should be settled, with power to rectify the register in all cases where rectification is required in pursuance of the Act; and this being done, the Court is required to order the assets to be collected and applied in discharge of liabilities. The powers of the liquidator under s. 95 are confined to steps taken with the sanction of the Court for winding up the affairs of the society and distributing the assets, and among the acts that he is empowered to do no provision is made for alteration of the list of contributories when once settled by the Court.

The learned counsel for the appellant could point to no section except s. 35 in support of the application. But it seems clear that s. 35 is not applicable to transfers after the date of a winding-up order made by the Court, because it contemplates a proceeding instituted without leave of the Court against the society, and not against the liquidator. But once the order has been made, the leave of the Court would seem to be indispensable under s. 87. But it was contended that no leave was necessary

(1) Law Rep. 3 Q. B. 689.

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because of the provisions contained in s. 153. Under the terms of that section it was argued that a transfer of shares or alteration in the status of a member between the commencement of the winding-up and the order could only be made with the sanction of the Court; but after that date it was said the sanction of the Court was not necessary. It followed that s. 35 must be construed to apply to all such subsequent transfers.

But it seems to us the true meaning of the 153rd section is to permit, with the sanction of the Court, dispositions of shares for the time specified in the section, and to prohibit all subsequent alteration of the status of members or contributories.

If this be not the true construction, the most inconvenient consequences would follow in cases where calls had to be made on contributories. There would be no limit to the number of times in which transfers of shares might be made in the course of the winding-up. It would be difficult to say what the position of the parties to such transactions would be; and, in providing for the liabilities of the society, the liquidator would be hopelessly embarrassed and delayed.

The alteration of the register under s. 35 might involve most troublesome and expensive inquiry and litigation; and, as a liquidator who acted properly ought not to be made responsible for costs, the expense must be cast on the assets of the society, which are already appropriated under the winding-up order to the society's creditors.

We have come to the conclusion that the judgment of the county court judge was right, and must be affirmed with costs.

Appeal dismissed.

J. R.

Against this decision the applicant appealed.

July 21. *W. A. Meek*, (*Sir Henry James, Q.C.* with him), for the appellant. There is no reason why a transfer of shares should not be made after a winding-up order, and the transferee registered in the ordinary course. If so the register can be ordered to be rectified under s. 35. There is no provision in the Companies Act, 1862, to forbid the registration of such a transfer. Sect. 153 only applies to transfers made between the petition and the

order for winding-up; and they may be ordered to stand good by the Court.

In *Rudge* v. *Bowman* (1), Blackburn, J., says, "as soon as the list of contributories is fixed, although no transfer can be made till after that, I see no objection in substance to a transfer of shares. If a man choose to speculate in the shares of a company being wound up on the chance of making a profit, and the holder is willing to sell, what is there in point of law forbidding such a bargain, or what is there in the statute which says such a bargain shall not take place?"

[LORD ESHER, M.R. It must be observed that the actual question in that case was as to the right of the seller to indemnity as between himself and the purchaser. It was not a question as between the purchaser and the company whether a transfer could be registered.]

Lord Blackburn's observations seem, however, to go to the question as between the transferee and the company. The company continues to exist until it is dissolved; and, so far as not expressly provided otherwise by the statute, the ordinary legal incidents of business with regard to the transfer of shares and registration of members must continue. It is contended that, though the transferor cannot be removed from the list of contributories, the transferee may be put on the register of members. It is important to the Assets Realization Company that the transferees of these shares should be put on the register, because they desire to have a vote in any meetings to be held under the winding-up. Sect. 87 does not apply to proceedings as between persons entitled as members and the company inter se, but only to proceedings against the company from outside. This is an application to the Court having the direction of the winding-up; it is not a proceeding against the company within the section. If the section applies, and leave of the Court is therefore necessary, it is submitted that the Court should grant leave.

[BOWEN, L.J. The section seems to contemplate leave given before the commencement of the proceedings.]

It is submitted that it could be given even after the commencement of the proceedings.

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[LORD ESHER, M.R. It would seem that Lindley, L.J., thinks that transfers after a winding-up order are a fortiori void unless the Court sanctions them: see Lindley on the Law of Companies (5th Ed.), p. 832. If that be so, this transfer is void unless the Court otherwise orders, and there has been no order allowing it to be good.]

It is submitted that the county court judge might have otherwise ordered, and the Court should do so now on appeal from him. So far as the question of discretion is concerned, there is no mischief in a company, such as the Assets Realization Company, buying up shares in a company that is being wound up. It is an advantage to needy shareholders who cannot wait for the result of a tedious winding-up to be enabled to realize at once. [He cited also *In re Anglesea Colliery Co.* (1)]

Seward Brice, Q.C., and *W. Howland Jackson*, for the liquidator. Sect. 35, under which this application was made, only applies to the ordinary state of things before the winding-up order. Assuming that, after the list of contributories has once been settled under s. 98, it can be altered, such an alteration of the list can only be with reference to facts which existed at the date of the winding-up order. It can only be altered for the purpose of putting on persons who ought to have been put on at the date of the winding-up. Reading s. 98 in connection with s. 153, it is contended that there is no provision for the rectification of the register after the winding-up order, except in cases within s. 98.

[KAY, L.J. The words of s. 35 seem to be general, and to apply as long as the company exists, except so far as the Act provides otherwise.]

The general scheme of the Act is that the list of members who are to be contributories shall be fixed with reference to the date of the winding-up order. Sect. 153 gives no power to declare a transfer made after the winding-up order good.

[BOWEN, L.J. You are treating it as an enabling section; but it is not so framed.]

It is clear that, assuming there could be a rectification of the register in this case under s. 98, it would require the leave of the Court, because the Court only can settle the list of contribu-

(1) Law Rep. 1 Ch. 555.

tories. No such leave was obtained. Again, such a proceeding as this, by reason of s. 87, requires the leave of the Court, for it is clearly a proceeding against the company. Here the appellant claims as of right to be registered.

[LORD ESHER, M.R. It is clear that the form of the application was wrong. But might not the applicant have applied in one application for the sanction of the Court, that the Court should alter the list of contributories, and that they should order a rectification of the register accordingly? And, if so, could we not amend, if we were in favour of the appellant on the substance of the case?]

Treating the case as one of discretion, the county court judge rightly refused the application. [He was stopped as to this point.]

[They cited *Ward and Henry's Case* (1); *Ex parte Shaw* (2); *Reese River Silver Mining Co.* v. *Smith.* (3)]

Meek, in reply.

LORD ESHER, M.R. In this case an application was made to the county court judge by Mr. Broad to order that he should be put on the register of members of the society. His contention before the county court judge, and afterwards before the Divisional Court, and again before us, was that he had a right to be put on the register and that the Court was bound in its judicial capacity to order that he should be put upon it. The grounds of his claim were that he had bought the shares from a member of the society, and obtained a transfer from such member, and so had become the owner of the shares both legally and equitably, and as such entitled to be on the register. The objection taken to his contention was that the contract for purchase of the shares and the execution of the deed of transfer were both subsequent to an order for the compulsory winding-up of the society which had been made by the Court, and that under those circumstances he could not maintain his claim. The answer made to that objection is that, admitting that the contract was made and the deed of transfer executed after the order for winding-up, there

(1) Law Rep. 2 Ch. 431. (2) 2 Q. B. D. 463.
(3) Law Rep. 4 H. L. 64.

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is nothing in the Companies Act, 1862, to make such a transfer invalid or take away from the transferee his consequential right to be registered. It is admitted that, if the contract had been made or the deed of transfer executed between the commencement of the winding-up and the order for winding-up, the transfer, so far as recognition of it by the company is concerned, would by reason of s. 153 be void, unless the Court should otherwise order; but it is said that this transfer is not within the terms of that section, and therefore there is nothing in the Act to render it void so far as the company is concerned, and the ordinary course must be followed with regard to it. This question depends on the true construction of s. 153 and whether that section applies only to a transfer between the commencement of the winding-up and the order for winding-up, or applies also to a transfer of shares after such order. Many reasons have been given in the judgment in the court below to shew that the former construction would be absurd; that it would really be absurd to suppose that the legislature meant to strike at a transfer made between the commencement of the winding-up and the making of the winding-up order, but to allow a transfer made after an order for winding-up to take effect. I think that that would be an absurd result. That view is evidently taken by Lindley, L.J., in the passage which has been referred to in his Book on Companies, for he says, after considering the cases on the subject, that, if a transfer made between the commencement of the winding-up and the winding-up order is void so far as recognition of it by the company is concerned, unless the Court otherwise order, à fortiori a transfer made after the winding-up order would be void. This view is entirely in accordance with that expressed by the Divisional Court. The absurdity of the other view appears to me so palpable and its inconvenience so great, that I have no doubt that the section applies to a transfer made after the winding-up order as much as to one made between the commencement of the winding-up and the order for winding-up. If by a necessary or anything like a reasonable construction the section does mean that, I have no doubt that the Court has the same power in the case of a transfer made after the winding-up order as in the case of one made between the commencement of

the winding-up and the winding-up order. Therefore it appears to me that the true construction of the section is that a transfer made between parties after the winding-up order is void, so far as regards any effect to be given to it by or against the company, unless the Court otherwise orders. The result is that the Court may make an order that such a transfer shall not be void. I say that it is "void so far as regards any effect to be given to it by or against the company" on account of the case of *Rudge* v. *Bowman* (1); because I take that case to have really decided that, as between the parties to such a transfer and as regards the liability of one of them to the other, the transfer is not affected by the Act. If the parties choose to make such a contract, it may be good as between themselves, though, if either of them desires that any effect should be given to it by the company, the Act does apply. I think that that was really the decision in *Rudge* v. *Bowman.* (1) There were no doubt in that case remarks made by Blackburn, J., which, like all remarks made by him, require careful consideration; but, though he may have used certain words or sentences apparently to the contrary, I do not think that what we are holding is really opposed to his meaning, as it is to be gathered from the whole of what he said. If what I have said with regard to s. 153 be correct, it follows that the Court on a proper application to it—which it must be observed was not made in this case—might have ordered that this transfer should not be void. If it had done so, what would the effect have been? The effect would have been that, so far as relates to the rights of the parties to it with regard to the company, it would have been good. If there were no question of a winding-up order and the transfer were good, then the transferee would have a right to be registered. Then how does the matter stand where there has been a winding-up order? That involves the consideration of s. 98. If the Court has ordered that the transfer shall be valid, then it has to be dealt with as regards its effect as against the company, which is not put an end to by the winding-up order, but only disabled for certain purposes. By s. 98, as soon as may be after making an order for winding-up the company, the Court is to "settle a list of contributories, with power

(1) Law Rep. 3 Q. B. 689.

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to rectify the register of members in all cases where such rectification is required in pursuance of this Act." I think that that limits the power to rectify the register to the time when the Court is settling the list of contributories. I do not think that, if after the list is settled nothing further is done to it, the Court can order the register to be rectified. Bearing in mind the construction which I have given to s. 153, I think that we must if possible construe s. 98 so as to render it capable of dealing with the cases that may arise under s. 153. Supposing that, after the list of contributories has been settled, something comes to the knowledge of the Court which makes it just and desirable that it should be altered, is there anything in the Act which says that, when the list of contributories has once been settled, it cannot be resettled? I cannot find anything; on the contrary, looking at rule 29 of the rules of 1862, which provides that the list may from time to time by leave of the judge be varied or added to by the official liquidator, it appears to me that the Act really gives power to alter the list, and there is no limit of time within which such alteration must take place. So I think that the list of contributories may be altered whenever the Court finds it just that it should be so altered; and there are instances to be found in which it has been so altered, when requisite, a long time after it was first settled.

Therefore the list may be resettled. When it is being resettled, it is being settled; and the Court, at the time when it is being settled, have power to rectify the register. The result is that the Court has power to order that such a transfer as this shall not be void, and to act on such order by resettling the list of contributories; and, consequently, it may order the register to be rectified. Therefore, on a proper application, the county court judge might have made an order that the contract should not be void, and had power thereupon to resettle the list of contributories and to rectify the register accordingly. I think that proceedings for such rectification cannot be taken without the leave of the Court, because I cannot doubt that such a proceeding is one against the company within s. 87. It is true that in form the application made here was against the liquidator; but really such an application is against the company. Therefore the leave of

the Court is necessary in order to rectify the register; and, if such leave is given, the way in which the matter must be worked out would be by saying that s. 35, by the leave of the Court, may be applied to the case. So, as I have said, the county court judge, on a proper application to him, might have declared that the transfer was not void, and then have altered the list, and thereupon have given leave to apply for a rectification of the register, and have ordered the register to be rectified; and I am inclined to think that all these matters might have been included in one summons; for to hold that there must be a separate summons and application in respect of each would only seem to involve unnecessary expense and waste of money. The county court judge declined to make the order asked for. I think that he had jurisdiction, and that he might have amended the summons if in the exercise of his discretion he had thought that it was really right that the applicant should be placed on the register. Under the circumstances, we must now exercise the discretion which he declined to exercise as we think he ought to have exercised it, and as if we were in his place. That brings me to the facts of this case. The Assets Realization Company, being of opinion on its calculations that the estate of the society which was being wound up would produce a surplus, and therefore there would be money coming back to the members, had bought up the shares of a great many members at a time when those members probably supposed that the prospects of the liquidation were not so hopeful as they appeared to be according to the calculations of the Assets Realization Company, such members probably being of a class to whom money offered in hand would exercise an attraction so much greater than possible money in the future as to be irresistible. It was a speculation by this company to obtain profit for themselves, and with a view to realizing that expected profit they seek to have their nominees put on the register, and so get a preponderating vote as to the manner in which the winding-up shall be conducted. Assuming that we have a discretion, we are not inclined to assist this company in their speculation in the manner desired, and we should prefer that the members of the society that is being wound up should be left with the control of the winding-up.

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We say nothing as to the result as between this company and the members with whom they have contracted. That must be determined upon other considerations, and in accordance with the decision in *Rudge* v. *Bowman*. (1) We therefore, in the exercise of our discretion, decline to make the order asked for. We think that the decision of the county court judge and that of the Divisional Court were right in the result, though we do not put our decision on the want of jurisdiction, but on discretion. Another reason for refusing to exercise our discretion in favour of the applicant is that, having regard to the way in which he has made his claim and insisted on it as of right through all the stages of the case, it would be a strong thing to say that we will amend the whole of his proceedings. I do not say that we could not amend if we thought it just; but for the reasons above mentioned we do not think so. It appears to me that, on the grounds which I have mentioned, the appeal must be dismissed.

BOWEN, L.J. This is an application for rectification of the register, under s. 35 of the Companies Act, 1862. It seems to me clear that in any view of this case the Court has absolute power to give or refuse the leave to have the register rectified. Sect. 35 must be read with s. 87, which forbids any proceedings against the company, after a winding-up order, except with the leave of the Court. The question whether a proceeding under s. 35 is a proceeding against the company appears to me to admit of but one answer—viz., that it is. That section gives a summary mode of enforcing rights which might have been prosecuted by a suit in Chancery, or possibly by an action for a mandamus at common law. It is impossible to say, if the circuitous proceeding would have been a proceeding against the company, that the compendious one is not so also. That being so, the proceeding can only be taken by leave of the Court. The counsel for the liquidator opposes the application on the broad ground that such leave cannot be given after the making of the winding-up order. He says that when s. 98 is looked at it shews, if properly read, that, as soon as the order for winding-up has been made, the Court is to settle a list of contributories, and that there

(1) Law Rep. 3 Q. B. 689.

is no power of rectifying the register except so far as may be necessary for the purpose of giving effect to rights and remedies which existed at the time of the settling of the list, or of the making of the winding-up order. In the first place, it seems to me that the expression "settle the list" in the section must be equivalent to "settle and from time to time, as justice requires, resettle the list"; because it appears by rule 29 that it is not to be settled once for all, but may be resettled as justice requires. On such resettlement an incidental necessity for rectifying the register would arise. The argument, however, is that power is only given to rectify the register when such rectification is required in pursuance of the Act, and that the Act does not shew that, after the order for winding-up has been made, there can be any case for rectifying the register, except so far as to give effect to rights and remedies which existed at the time of the winding-up order. I think that, unless we are absolutely obliged to do so, it is always undesirable to draw a hard and fast line limiting the power of the Court to do justice. I do not find anything in the Act which says that the power to rectify the register is confined to the case of rights which existed before the winding-up order was made. The powers of the liquidator are defined by s. 95; and his powers under the terms of that section seem to me to extend to cases, which are conceivable, where it might be for the benefit of the company that effect should be given to transfers made after the winding-up order. I can conceive that there might be cases in which it would be just and proper that effect should be given to such transfers. I do not see why in such cases there might not be rectification of the register by the leave of the Court. To that extent, I think the authority of *Rudge* v. *Bowman* (1) may be vouched, because in that case the Court seemed to think that, even after a winding-up order, the register might be rectified, so as to give effect to a contract for sale of shares which had been made before the winding-up order. Blackburn, J., appears to have thought that the hands of the Court were not tied as to contracts after that date. I hesitate to accept as an absolute rule of law that the hands of the Court are tied, except as to rights which had accrued at the date of the

(1) Law Rep. 3 Q. B. 689.

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winding-up order. I wish, however, to observe, lest I should be misunderstood, that in nine cases out of ten, it would be undesirable that the list of contributories should be resettled upon considerations arising ex post facto. It would be inexpedient that the Court should lightly allow, after the list has once been settled, changes which could only operate for the purpose of enabling people to speculate on what the result of the winding-up might prove to be. It is not to be taken, therefore, that it would be an easy matter to obtain the leave of the Court for such an alteration of the list. Heretofore I have treated the case quite apart from s. 153 of the Act. Before coming to that section I should like to say a word or two about the passages cited from the work of Lindley, L.J., on Companies, at pp. 832 and 837 of the 5th ed. I think that those passages must be read together. He says at p. 832 that transfers made after a winding-up order are à fortiori void, if not sanctioned by the Court or the liquidators. At p. 837 he says: "In connection with this subject it is to be remembered that sales of shares after the commencement of a winding-up are not void under s. 153 of the Companies Act, 1862, and transfers after that date may be approved by liquidators." That rather fortifies the impression which I had formed that under clauses 2 and 8 of s 95 of the Companies Act, 1862, the Court may recognise transfers after the winding-up order if beneficial to the company. I now come to s. 153. It does not seem to me that Lindley, L.J., thinks that that section makes a transfer subsequent to the winding-up order void. Sect. 153 does not apply to such a case at all. But if it did, the order of the Court would be necessary, and the granting of such order would not, as it seems to me, be a matter of right but of discretion. Although not within the terms of s. 153, the intention of the legislature as to cases within s. 153 may be perhaps taken as a guide and caution; and, therefore, except in the most exceptional circumstances, I should be disinclined to give leave for proceedings to rectify the register. Like the Master of the Rolls, I do not deal with the case on any technical considerations as to the form of the summons taken out before the county court judge. I think that might have been amended by the judge, and I treat the case as if any necessary amendment had been made.

KAY, L.J. I wish to add a few words to what the other members of the Court have said. It is the first time in my experience of winding-up cases—which has been considerable, both at the bar and on the bench—that an application has been made to register a transfer of shares in a moribund company made after a winding-up order. I agree with the other members of the Court that there is power to allow the registration of such a transfer if the Court thinks fit. I arrive at that conclusion thus: the scheme of the Act is that, when an order for winding-up has been made, the Court shall as soon as possible proceed to settle a list of contributories, "contributories" meaning those persons who are members of the company, who will have to contribute to the payment of its debts, and amongst whom a surplus, if any would have to be distributed under s. 109. It is quite possible, and, indeed, it has happened in instances within my knowledge, that in such cases there may be surplus assets, and these would primâ facie be distributable among those persons who are upon the list of contributories when it has been finally settled. It further appears from the Act that the scheme of it is that the contributories are the only persons who have any concern in the winding-up except the creditors. One section often referred to, viz., the 91st, provides that the Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned for the purpose of ascertaining their wishes. But the list, even if settled, may be altered under s. 98 and the 29th rule from time to time, and, as Lindley, L.J., points out in his book on Companies, at p 747, there is no limit of time prescribed within which this can be done. The effect of s. 98, coupled with rule 29, is that the Court has power at any time before the dissolution of the company, however long after the list of contributories has been settled in the first instance, to alter the list, and, if necessary for that purpose, to rectify the register. I think that a case might occur where a transfer of shares had been made after the order for winding-up, in which the Court might think that it would be beneficial to the company and right to adopt the transfer, and carry it out by altering

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the list and rectifying the register. Such cases were indicated by Blackburn, J., in *Rudge* v. *Bowman* (1), e.g., where a wealthy man for some inscrutable reason takes such a transfer of shares in an insolvent company, and it would be for the benefit of the company and its creditors to put him on the list instead of the transferor. I have no doubt that the Court would have power to do this. In order to do it, there must be an application to the Court, because under s. 98 it is only the Court that can settle or alter the list of contributories, and under rule 29 it is only by leave of the judge that the list can be varied or added to. So that the leave of the Court or a judge must be obtained after the list is first drafted for an alteration of it; but there is no limit to the time within which this may be done. Therefore it is clear that, quite apart from s. 153, in order to alter the list of contributories and to rectify the register, which, after the winding-up, can only be done for the purpose of altering the list of contributories, the Court must be applied to for leave, the granting or withholding of which must be a matter of judicial discretion to be exercised according to all the circumstances of the case. I agree that s. 153 does not apply in terms to a transfer of shares after the winding-up order, but to one between the commencement of the winding-up and the order for winding-up; but that section is a very clear guide how the Court ought to exercise its discretion with regard to a transfer made after an order for winding-up in the case of an application by the transferee under such a transfer. As Lindley, L.J., says: "Transfers made after a winding-up order are à fortiori void if not sanctioned by the Court." They are so because no transfer after the winding-up order can be carried out without the sanction of the Court. I am only repeating what has been said over and over again when I say that the general scheme of the Act is that as the tree falls so it must lie, unless the Court chooses to alter the existing state of things. So I come to the same conclusion as has been indicated by the other members of the Court. Without saying that the case is within the terms of s. 153, I say that that section affords a good guide for the exercise of our discretion in the case before us, which is one of a transfer after the winding-up order.

(1) Law Rep. 3 Q B. 689.

I also agree that, in order to enforce an alteration of the register of members at any time, proceedings must be taken against the company. Consider the effect of such an alteration on the status of the company. Suppose instead of a hundred members, each holding one 10*l.* share, it were sought to register five members each holding twenty 10*l.* shares. It is obvious that there would be a serious alteration of the status of the company. Again, suppose it were sought to put on a number of transferees who were all more or less men of straw, or who all resided abroad. Again, it is obvious that that would seriously alter the status of the company. A proceeding for such a purpose certainly could not be taken under s. 35 without serving a summons on the company. Sect. 35 merely gives a summary mode of obtaining what otherwise could only be obtained by a Chancery suit or possibly a mandamus against the company: so a proceeding under it is essentially a proceeding against the company, and therefore it is within the very terms of s. 87, and cannot be taken without the leave of the Court. Therefore this is a case in which the leave of the Court is necessary before either the list of contributories or the register of members can be altered. As I have said, in my opinion, even in the case of a transfer such as this, the Court would have power to give such leave. But surely it does not need argument to shew that it would require a very strong case to induce the Court, after an order for winding-up, to put a subsequent transferee on the register instead of the transferor. People who transfer or buy shares after an order for the winding-up of a company must be supposed to do so for extraordinary reasons. If the transferees buy with a view to profit, such a contract is good as between themselves and their transferors without any transfer upon the register. The vendor may be bound to hand over such profits to the purchaser. I conceive, however, that before the Court gives leave to register such a transfer, it ought to see that to do so would be of some benefit to the company or those interested in its assets, and that it would not so exercise its discretion unless for very strong reasons. Then, are such reasons given here? I have been waiting in vain to hear any such stated on behalf of the appellant. No reason has been suggested except that the appellant wishes to attend

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meetings in the winding-up, and to vote at them. Speaking for myself, I am not inclined to allow him to be put on the register for that purpose, unless it could be shewn to be for the benefit of the society and its creditors that that should be done. There is nothing to shew that it would benefit anybody but the company which the transferee represents. The Court has, I think, a discretion; but it must be exercised in a judicial manner, and the Court ought not to exercise it in favour of such an application without very strong reasons. On these grounds I concur in the result of the decision of the county court.

Appeal dismissed.

Solicitors for appellant: *Linklaters, for Lucas, Hutchinson, & Meek, Darlington.*

Solicitors for respondent: *Jackson & Jackson, for G. N. Watson, Darlington.*

E. L.

C. A.
July 20.

[IN THE COURT OF APPEAL.]

TOWERSON *v.* JACKSON.

Landlord and Tenant—Mortgage—Subsequent Lease by Mortgagor—Notice to pay Rent to Mortgagee—Possession of Tenant after Notice.

A mortgagor let the mortgaged premises subsequently to the mortgage. The mortgagees gave a notice to the tenant informing him of the existence of the mortgage, and requiring him to pay to them the rent thereafter to accrue due. The tenant continued in possession after the receipt of the notice, but there was no other circumstance from which an agreement for a tenancy could be inferred:—

Held, affirming the judgment of the Queen's Bench Division, that the mere fact of the tenant remaining in possession after notice to pay rent to the mortgagees was not evidence of an agreement that he should become tenant to the mortgagees.

APPEAL from a judgment of the Queen's Bench Division, on appeal from the County Court of Cumberland holden at Workington.

The owner of premises mortgaged them and subsequently granted a lease to the plaintiff, who sub-let to the defendant. By a collateral agreement the defendant agreed to purchase from the plaintiff all the beer to be sold on the premises. The

action was brought for breach of this agreement. The defence was that the mortgagee had sold the premises under his power of sale to Messrs. Jennings & Co., who claimed to be entitled to vacant possession, and threatened to evict the defendant unless he would become their tenant, and he thereupon agreed to do so. The plaintiff alleged that Jennings & Co. were not entitled to vacant possession on the ground that before selling to them their vendor had given the plaintiff notice that the premises were mortgaged, that the principal moneys were due and owing together with an arrear of interest, and had required the plaintiff to pay to him the rent then or thereafter to accrue due, and not to pay the same to the lessor. The plaintiff thereupon tendered the rent; but it was refused, except upon the plaintiff accepting certain conditions of tenancy which he had previously refused and still declined to accept.

The power to lease under the Conveyancing Act, 1881, s. 18, sub-s. 1, was negatived by the mortgage deed.

The county court judge held that to make the plaintiff tenant to the mortgagee there must be an agreement between them and a new tenancy created, and that there was no evidence of this, and he gave judgment for the defendant.

The Queen's Bench Division affirmed this judgment.

The plaintiff appealed.

T. Willes Chitty, in support of the appeal. The notice by the mortgagees to the defendant was an acknowledgment of his tenancy, and his remaining in possession after the notice was a sufficient acquiescence on his part to create the relation of landlord and tenant between them: *Underhay* v. *Read.* (1) Consequently the mortgagees could only sell subject to the lease, and there has been no ouster of the defendant. [He cited *Brown* v. *Storey.* (2)]

Mattinson, contrà, was not heard.

LORD ESHER, M.R. The plaintiff cannot succeed unless the mere fact of a tenant remaining in possession after receiving such a notice as was given by the mortgagees in this case is

(1) 20 Q. B. D. 209. (2) 1 M. & G. 117.

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conclusive evidence that he has agreed to remain as tenant, and that the mortgagees have assented to his doing so. I am prepared to say not merely that it is not conclusive, but that the mere fact of his remaining in possession is no evidence of such an agreement. After some conflict it was decided in *Evans* v. *Elliott* (1), which is cited in the notes to *Moss* v. *Gallimore*, in 1 Smith's Leading Cases, 9th ed. p. 613, that the mortgagee cannot, by the mere fact of giving the mortgagor's tenant a notice, cause him to hold of the mortgagee, but that there must be a consent by the tenant to hold of the mortgagee. That decision was distinct; and yet it is said that if the tenant remains in possession after a notice, *Brown* v. *Storey* (2) shews that that alone is evidence of consent, and the judgment of Manisty, J., in *Underhay* v. *Evans* (3) is cited in support of that view. If *Brown* v. *Storey* (2) did so decide, it is wrong and cannot be supported, because it would be contrary to what was laid down in *Evans* v. *Elliott* (1), which I have no doubt was rightly decided. In the present case a notice is given by a person who has nothing to do with the tenant, and no authority to make an agreement for him. All he can do is to turn him out or make him an offer. An offer cannot be binding on the tenant unless it is accepted, and the mere fact that such an offer has been made cannot be evidence of assent. That was the decision in *Evans* v. *Elliott* (1), and if subsequent cases have tampered with it they cannot be supported. I am of opinion that we must follow that decision, which governs this case, and that there was no evidence of an agreement of tenancy between the mortgagees and the plaintiff, and that the appeal must therefore be dismissed.

BOWEN, L.J. That the mere continuing in possession of the tenant after receipt of such a notice is not conclusive of the creation of a new tenancy is too plain for argument. Is it true that the service of notice without anything more is a circumstance from which a jury should conclude that a new agreement has been completed between the mortgagee and the mortgagor's

(1) 9 A. & E. 342. (2) 1 M. & G. 117.
(3) 20 Q. B. D. 209.

tenant? In *Brown* v. *Storey* (1) there were two propositions: one, that the relation of landlord and tenant can only be created by contract assented to by both parties; and the other, that when nothing was done by the tenant after receipt of the notice but to continue in possession, he must be taken to have assented to remain in possession upon the old terms. The first is correct; the second seems to me to be wrong. Mere service of notice on the tenants would be no evidence of consent. Consent can only be gathered from the conduct of the person who receives the notice. It cannot be expected that the tenant on the receipt of the notice should go out of possession, and there is nothing in the mere fact of his continuing in possession which indicates that by so doing he intended to convey a complete acquiescence in the terms offered by the other side. Under the circumstances, it is clear that *Brown* v. *Storey* (1) on the second point, viz., that of notice, was wrongly decided. If *Underhay* v. *Read* (2) adopts the contention put forward in that case, I think that it cannot be supported. For these reasons I entirely agree with the Master of the Rolls.

KAY, L.J. I also agree. The plaintiff did no act whatever which was evidence of an agreement to become tenant to the mortgagee, except that he continued in possession. It is said that is conclusive evidence. I do not think *Brown* v. *Storey* (1) establishes anything of the kind. That case came before the Court on a motion for a new trial on the ground of misdirection. The judge told the jury that he was of opinion that by the notice alone the tenant of the premises became tenant to the mortgagee. Bosanquet, J., in giving judgment, said, "It is clear there can be no demise without an assent by both parties." Tindal, C.J., says the same, and throughout the question was not whether there was any doubt as to the assent of the tenant to the notice, but whether that ought to have been left more precisely to the jury. In *Partington* v. *Woodcock* (3) Patteson, J., says: "I never could see how notice could make the mortgagor's tenant tenant to the mortgagee at the former rent. There might,

(1) 1 M. & G. 117. (2) 20 Q. B. D. 209.
(3) 6 Ad. & E. 690, at p. 695.

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indeed, be a new tenancy created at the old rent where such notice was given and the rent paid accordingly." It seems to me that the balance of authority is strongly in favour of the view that there must be more than a mere notice from the mortgagee without any assent shewn by the tenant, and that such assent is not established by the mere fact of the tenant remaining in possession.

Appeal dismissed.

Solicitor for plaintiff: *H. Nelson Paisley, for Paisley & Falcon, Workington.*

Solicitors for defendant: *Harrison & Powell, for J. McKeever & Son, Carlisle.*

A. M.

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July 30.

[IN THE COURT OF APPEAL.]

HAMLYN & CO. *v.* WOOD & CO.

Contract—Implied Term—Necessary Implication—Agreement for Sale of Products of a Business.

The defendants, who carried on business as brewers, entered into an agreement in writing, by which they agreed to sell to the plaintiffs, and the plaintiffs agreed to buy, all the grains made by the defendants, at the average of the rates charged each year by certain specified firms, from July 10, 1885, until September 30, 1895. In 1890 the defendants sold their business, and in consequence ceased to supply grains to the plaintiffs:—

Held, that a term could not be implied in the contract to the effect that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains to the plaintiffs for the period mentioned.

Such an implication of a term in a contract ought to be made only where it is necessary in order to give the transaction such efficacy as both parties must have intended it to have, and to prevent such failure of consideration as cannot have been within the contemplation of either party.

The question whether in any case such an implication ought or ought not to be made must depend on the particular facts of the case. The construction of one contract in this respect affords little or no guidance for the construction of another.

ACTION for breach of contract.

The facts as proved at the trial before Mathew, J., with a jury, were as follows. The defendants formerly carried on a large business as brewers under the firm of Wood & Co. The plaintiffs

and defendants had entered into a written contract as follows: "Wood & Co." (the defendants) "agree to sell, and Hamlyn & Co." (the plaintiffs) "agree to buy, all the grains made by the said Wood & Co., at the current rates charged each year by the following firms [then followed the names of certain firms of brewers] from the 10th July, 1885, until the 30th September, 1895, inclusive. In the event of there being any difference in the rates of the above firms, then the average price charged by them shall be taken as the current rate. The quantity of grains to be calculated monthly, and payment for the same to be made at the brewery on or before the last day in the month following delivery. The said Hamlyn & Co." (the plaintiffs) "to throw the grains out of the mash-tub, and empty and clear away the same in a proper and workmanlike manner at their sole expense on the day on which they are made, and to pay for any damage done by carelessness of the persons employed by them, otherwise the said Wood & Co." (the defendants) "to be at liberty to cart away and dispose of the grains in the best manner they in their opinion can, and such carting and disposal to be made at Hamlyn & Co.'s cost, and any loss made by such sale to be sustained by them." In August, 1890, the defendants sold their business to Watney & Co., who did not adopt the contract; thereupon the plaintiffs brought an action against the defendants for refusing to continue to perform the agreement, and to sell grains to the plaintiffs pursuant to the terms thereof.

The plaintiffs contended that it was an implied term of the agreement that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains under it for the period specified, and that the sale of their business was a breach of such implied term. The jury assessed the damages at 350*l.*, and Mathew, J., gave judgment for the plaintiffs for that amount. The defendants now moved for judgment or a new trial, on the ground that the learned judge's ruling was erroneous.

Finlay, Q.C., and *Sills*, for the defendants. The Court cannot imply such a term as is suggested in an agreement, unless, without such a term, the whole agreement would be frustrated, or

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there would be a failure of consideration: *The Moorcock.* (1) It is a perfectly reasonable agreement to make that the defendants shall, if they carry on business for ten years, sell grains to the plaintiffs at the current rates, to be ascertained from time to time; and that is what the express contract imports. There is, therefore, no necessity to make an implication such as is suggested in order to give effect to the agreement, or to prevent a failure of consideration. Such cases as *McIntyre* v. *Belcher* (2) are altogether different from this. In that case a surgeon sold his practice, and the purchaser, in consideration of being introduced to the patients, was to pay a certain percentage of the profits for a certain number of years. There would be a failure of consideration if, after the seller had parted with his property, the purchaser could voluntarily discontinue the practice. A term can only be implied when it is obvious that the parties must have intended it. It is impossible to suppose that the parties in this case contemplated that a large brewery business should be carried on at however great a loss, or whatever price might be offered for it, in order that the sale of refuse products, such as grains, should be continued. In *Turner* v. *Goldsmith* (3) there was an express contract to employ for a certain period, and the attempt was to qualify that by the implication of a condition. So that case is an authority in favour of the defendants. [They also cited *Stirling* v. *Maitland* (4); *In re Railway and Electric Appliances Co.* (5); *Rhodes* v. *Forward* (6); *Telegraph Dispatch Co.* v. *McLean.* (7)]

R. T. Reid, Q.C., and *Ernest de Witt* (*Clarence Hamlyn*, with them), for the plaintiffs. It is submitted that the obvious intention of the parties was that the contract should last ten years. If so, a stipulation should be implied that during that period the defendants would not voluntarily disable themselves from its performance: *Stirling* v. *Maitland.* (8) The result of the defendants' construction is that the plaintiffs are bound to take the grains for ten years, whereas the defendants are not

(1) 14 P. D. 64.
(2) 14 C. B. (N.S.) 654.
(3) [1891] 1 Q. B. 544.
(4) 5 B. & S. 840.
(5) 38 Ch. D. 597.
(6) 1 App. Cas. 256.
(7) Law Rep. 8 Ch. 658.
(8) 5 B. & S. 840.

bound to supply them, which is hardly reasonable. If the result of not making the implication of the term suggested is that one of the parties would be left in a position which he could not be supposed, as a matter of business, to have intended to accept, the implication ought to be made. It does not follow that the defendants must carry on the business at a loss, or refrain from taking an advantageous offer for the purchase of it; the utmost consequence is that they must pay the damages which the plaintiffs have sustained. [They cited *Charnley* v. *Winstanley* (1); *Brown & Co.* v. *Brown* (2); *Ex parte Maclure. In re English and Scottish Marine Insurance Co.* (3); *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy.* (4)]

Finlay, Q.C., in reply.

LORD ESHER, M.R. The question is whether we can agree with the implication that Mathew, J., has made in this case. A large number of cases have been cited, in some of which the Court implied a stipulation, and in others refused to do so. In my opinion, it is useless to cite such cases, so far as they merely shew that in the particular case an implication was or was not made. The only use of citing such cases is where they lay down the rule as to such implications, upon which the Court will act in dealing with the particular case before it. I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned. In the case of *The Moorcock* (5), Bowen, L.J., laid down the principle upon which such implications must be made in terms which seem to me to be really an expansion of the terms I have used, and with which I entirely agree. He said, in that case (at p. 68): "An implied

(1) 5 East, 266.
(2) 35 L. T. (N.S.) 54.
(3) Law Rep. 5 Ch. 737.
(4) 3 Ind. App. 200.
(5) 14 P. D. 64.

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warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe, if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

It is admitted in the present case that there has been no breach of any express stipulation of the agreement, and therefore we are asked to imply a stipulation of which there has been a breach. The stipulation we are asked to imply is, not that the defendants contracted to carry on their business for ten years, but that they contracted that they would not during that period wilfully do anything to prevent their so doing. If you cannot imply the first of these stipulations as a matter of business, I should think it would be very difficult to imply the second. The express contract is not that the defendants will sell the plaintiffs' grains for ten years; it is that the defendants will sell, and the plaintiffs will buy, all grains made by the defendants for ten years. What was the object of those parties as business men in entering into this agreement? The last stipulation of the contract shews that it was an advantage to the defendants to get the grains carried away from their brewery. Then what was the advantage which the plaintiffs as business men sought to gain? If the contract is construed against their contention, do they still gain something? It must be assumed that they must have thought that they would gain a profit by buying the grains at the agreed price; and therefore it was an advantage to them to have the right of purchasing any grains the defendants might make in preference to any other purchaser for ten years. The agreement is not that they are to pay a sum down

and then to have the grains for ten years, so that, if they did not get grains for ten years, they would not get what they had paid for. That would be a different case. In that case they would have paid money for nothing, unless the implication were made that the other party had stipulated that they would not voluntarily discontinue the business during ten years. The agreement is to pay a price to be ascertained from time to time, as provided by the contract, for the quantity of grains which they from time to time obtain. Therefore, it cannot be said that, unless the implication suggested is made, they will have paid money for nothing. Such being the terms of the contract, the question is whether we can say, looking at the contract in a reasonable and business way, that it is a necessary implication that both parties contemplated an undertaking by the defendants not voluntarily to discontinue the business for ten years, at whatever loss they might carry it on, or however advantageously they might be able to sell it. It seems to me that such an implication is tremendously strong, and one which is beyond all bounds. I cannot come to the conclusion that the defendants ever contemplated such a thing, or that the plaintiffs were entitled to suppose that they did so.

I do not think it necessary to go into the various cases which have been decided in regard to other contracts. In this case I decline to make the suggested implication. For these reasons I think that the defendants are entitled to judgment.

BOWEN, L.J. I shall not say more than a few words. With great respect to that eminent judge, Mathew, J., I must say that I differ entirely from the conclusion at which he has arrived, and entertain no doubt whatever that the defendants are right. I object on principle to examining a number of different contracts, which have been made the subject of judicial decisions, to see what the Courts have implied, or refused to imply, in reference to the expressions used in those contracts. In some cases it may be necessary, in order to give effect to a transaction, that the law should imply a stipulation not wilfully to put an end to a business, although the parties had not made such a stipulation in terms. The question is whether such an

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implication is necessary here, or whether without such an implication the contract may not have a very reasonable effect. I will not repeat what I said in the case of *The Moorcock.* (1) For the reasons which the Master of the Rolls has given, I think we ought not to make the implication suggested.

KAY, L.J. When parties have put into writing the terms upon which they agree, more especially in the case of mercantile contracts, it is a dangerous thing lightly to imply what they have not expressed. Here it is clear that there is no breach of the contract as expressed upon the face of the written document. The written contract only amounts to an engagement by the defendants to sell to the plaintiffs all grains made by them in their business as brewers for ten years, not for a sum paid down, but at the current price, to be ascertained from time to time as provided by the agreement. Within the period of ten years the defendants sold their business, and the purchasers of the business declined to adopt the contract. The plaintiffs thereupon bring an action, and put their claim on the footing that, admitting that there has been no breach of any express contract, a term ought to be implied of which there has been a breach. I agree with the rule as laid down by the Master of the Rolls, viz., that the Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied. To state the rule in any wider terms would be going, I think, beyond what is justifiable on principle. All the decisions that have been cited are merely instances in which the case fell on one side or the other of the line, and, where the implication was made, it was only because the Court was driven of necessity to imply a term in order to carry out what was undoubtedly the intention of both parties. The nature and extent of the contract which the Court will imply in such cases is stated by Cockburn, C.J., in the case of *Stirling* v. *Maitland.* (2) He says: "I look on the law to be that, if a party enters into an arrange-

(1) 14 P. D. 64. (2) 5 B. & S. 840.

ment, which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative." In this case it seems to me very reasonable to conclude from the language used, and all the circumstances of the case, that all that either party intended was that, if the defendants should carry on business for ten years, they should sell their grains to the plaintiffs at the current prices to be ascertained as mentioned in the contract. It would have been a different thing if the contract had been to pay so much down for a supply of grains for ten years. I will not express any opinion as to the effect of such a contract, as each case must depend on its own particular circumstances; but the argument in such a case would certainly have been much stronger in favour of implying an agreement by the defendants that they would not by any voluntary act of their own prevent themselves from carrying out the contract for ten years. Here, if we were to imply such a contract as is suggested, we should, as it seems to me, be incurring great danger of implying something that neither party ever intended. It is enough to say that I am not satisfied that either party intended that the defendants should be bound not to sell the business for ten years. On these grounds I think that the case is not brought within the principle upon which such implications are made; and we should not be justified in adding the term suggested to the written contract.

Appeal allowed.

Solicitors for plaintiffs: *Lumley & Lumley.*
Solicitors for defendants: *Pownall, Son, Cross, & Knott.*

E. L.

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June 9; July 7.

HOW *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Practice—County Court—Order of County Court Judge for New Trial—Appeal to High Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

Although an appeal to the High Court lies, under s. 120 of the County Courts Act, 1888, against an order of a county court judge granting a new trial, on the ground that his decision is wrong in point of law, no such appeal lies where the order is made solely on the ground that the verdict is against the weight of evidence.

APPEAL of the plaintiff from an order of the judge of the Leighton Buzzard County Court, granting a new trial upon the ground that the verdict was against the weight of the evidence.

The action was brought to recover damages for the loss of certain calves sent from Leighton Buzzard to St. Neots, the allegation of the plaintiff being that the defendants neglected their statutory duty to provide a truck properly cleansed for their conveyance, and that in consequence the calves fell down owing to the slippery state of the floor of the truck, and several of them died. The contention of the defendants was that the calves died through the negligence of the plaintiff himself in leaving them in the truck after their arrival at St. Neots during the whole of a frosty night, and not supplying them with food for twenty-four hours. At the trial the jury found that the defendants had sent the truck out in a dirty condition, and that the injury to the calves was the result of the condition of the truck, and not of the plaintiff's treatment of them. Upon a subsequent day an application was made by the defendants for a new trial, which the learned judge (who accepted the finding that the truck was sent out in a dirty condition) granted upon the ground that the verdict was against the weight of evidence. Against this order the plaintiff now appealed.

J. W. Cooper, for the plaintiff.

Shearman (*Haycraft*, with him), for the defendants, took the preliminary objection that no appeal lay under s. 120 (1) of the

(1) By s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43): "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the

County Courts Act, 1888, from an interlocutory order of a county court judge.

The arguments of counsel appear from the judgment.

[The following cases were referred to: *Carr* v. *Stringer* (1); *Jonas* v. *Long* (2); *Dingor* v. *Matthews* (3); *Reg.* v. *Deputy Judge of Croydon County Court* (4); *The Cashmere* (5); *Carruthers* v. *Fisher* (6); *Voysey* v. *Armitage.* (7)]

After the conclusion of the arguments the Court heard the appeal upon the merits, and reserved their judgment upon the whole case.

Cur. adv. vult.

July 7. The following written judgment of the Court (Cave and Charles, JJ.) was read by

Cave, J. This is an appeal from an order of the County Court Judge of Leighton Buzzard ordering a new trial, the jury having found a verdict for the plaintiff. A preliminary objection was taken that no appeal lies against such an order. Several cases were cited in the argument, of which the earliest is *Carr* v. *Stringer.* (1) In that case the plaintiff sought to appeal under 13 & 14 Vict. c. 61, s. 14, against an order of the judge reviewing the taxation of costs in the action. That section gave an appeal from the determination or direction of the Court in point of law, and gave the Court of Appeal power to order a new trial or to order judgment to be entered for either party. The Court there held that that section gave no appeal against such an order.

The next case of any importance is *Jonas* v. *Long.* (2) The action was one for winding up a partnership, and the plaintiff, who had been appointed receiver, obtained an order directing Harris, one of the defendants, to pay into Court a sum of money

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admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner, and subject to such conditions, as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court."

(1) E. B. & E. 123.
(2) 20 Q. B. D. 564.
(3) 88 L. T. Journ. 139.
(4) 62 L. T. 583.
(5) 15 P. D. 121.
(6) L. J. Notes of Cases (1889), p. 135.
(7) L. J. Notes of Cases (1890), p. 168.

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found to be money belonging to the partnership, and admitted to be in his hands. This order was not complied with, and a further order was made committing Harris for contempt. Harris appealed against this last order, and, on objection taken by the plaintiff, it was held that an appeal lay in such a case under 28 & 29 Vict. c. 99, s. 18, which provided that if any party in a suit or matter should be dissatisfied with the determination or direction of the judge on any matter of law or equity, or on the admission or rejection of any evidence, such party might appeal to the Vice-Chancellor, who might make such final or other decree or order as he should think fit. On reading the judgment of Fry, L.J., it will be observed that he founds his decision that an appeal lay on the language of that part of the section which conferred power on the Vice-Chancellor to make such final or other decree or order as he should think fit. Both the above-mentioned enactments have now been repealed, and the present question must be decided on the language of the County Courts Act, 1888.

Sect. 120 of that Act enacts that if any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the judge, may appeal from the same to the High Court in such manner, and subject to such conditions, as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court; provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment, or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds, nor in any action of replevin where the amount of rent or the damage or value of the goods seized does not exceed twenty pounds, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed twenty pounds, nor in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed twenty pounds, unless the judge shall think it reasonable and proper that such appeal should be allowed, and

shall grant leave to appeal. At the trial or hearing of any action or matter in which there is a right of appeal, the judge at the request of either party shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter. Sect. 122 provides that on the hearing of an appeal the High Court shall have power to draw any inference of fact, and may either order a new trial on such terms as the Court shall think just, or may order judgment to be entered for any party as the case may be, or may make a final or other order on such terms as the High Court may think proper to ensure the determination on the merits of the real questions in controversy between the parties.

Now let us see whether the plaintiff, the present appellant, brings himself within these provisions. In the first place he is a party in the action, and as he alleges is dissatisfied with the determination or direction of the judge in point of law (on which last point we shall have more to say presently), and he desires to appeal from the order of the Court. The order complained of was not made at the trial of the action, but on a subsequent occasion. The appellant asks that judgment may be entered for him in accordance with the finding of the jury at the trial. The appellant therefore brings himself within all the conditions of the section except the requirement (if it be one) that the order should have been made at the trial of the action. In this case, as we have said, the order was made on an occasion subsequent to the trial, but it might, if the defendants had then applied, have been made at the time, and when made it took from the plaintiff the benefit of the judgment he had already obtained. Now what is the state of the authorities on the construction of the Act of 1888? In *The Cashmere* (1), it was held that no appeal lay under this Act against an order of a county court judge disallowing the costs of certain witnesses at the trial. That case was precisely the same as that of *Carr* v. *Stringer* (2), and the language of the new Act does not so differ from the old as to render the grounds of the decision in that case inapplicable. On the other hand it has been held by a Divisional Court in

(1) 15 P. D. 121. (2) E. B. & E. 123.

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Dingor v. *Matthew* (1), following *Carruthers* v. *Fisher* (2), decided November 30, 1889, and also (as we are informed by the counsel in the case) in *Murtagh* v. *Barry* (3), that an appeal will lie against an order of a county court judge granting a new trial, where such an order has been made on a mistaken view of the law. It certainly seems to be more convenient, where the judge has granted a new trial on a mistaken view of the law applicable to the case, and where therefore the party appealing is entitled to retain the verdict he has already got, that the appellant should be at liberty to come to the Court of Appeal at once, and have the mistake rectified and the original verdict restored, rather than that he should wait till after all the expense of the new trial has been incurred, and then appeal against the misdirection of the county court judge at the new trial, when the same result could be produced without expense and delay by appealing at once from the order for the new trial. This view of the law is not only convenient but has the authority of the two cases cited above, and in no way conflicts with the decision in *The Cashmere.* (4) It should be borne in mind that this does not involve the position that there is a right of appeal against the refusal of the judge to grant a new trial. In such a case there is an appeal against the determination or direction of the judge at the trial, and to hold that there is also an appeal against his subsequent refusal to alter that determination or direction is in effect indirectly to extend the time for appealing from the original determination or direction of the judge. For these reasons we are of opinion that an appeal does lie against an order of the judge granting a new trial, and thereby in effect altering the decision of the action arrived at on the trial. Such an appeal, however, like other appeals against an order of a county court judge, only lies on some point of law or equity, and we must now consider this point, which we specially reserved above. Where the judge had granted a new trial on the ground that the verdict was against the evidence it was held in *Wilton* v. *Leeds Forge Valley Co.* (5) that no appeal would lie. In that case it was laid down by Lord Coleridge, C.J., that where the county

(1) 88 L. T. (Journ.) 139.
(2) L. J. Notes of Cases (1889), p. 135.
(3) 24 Q. B. D. 632.
(4) 15 P. D. 121.
(5) 32 W. R. 461.

court judge has granted a new trial on the ground that the verdict is against the weight of the evidence, he is the sole judge of the question of fact whether that is so or not. In the case now before us the learned judge has granted a new trial solely on questions of fact, and we cannot discover that he has made any mistake of law, and therefore we have no jurisdiction to hear the appeal.

As there will be a new trial, it may be as well to mention one point which arises. The learned judge says that he asked the jury whether if the truck was sent out in a dirty and improper condition the injury to the calves was caused thereby, or wholly or in a material part by the plaintiff's own conduct in his treatment of them. What is meant by "in a material part" is open to misconstruction, but may have been properly explained to the jury. If, for instance, the calves were injured to the extent of half-a-crown a head when they got to their destination owing to the improper condition of the truck, and subsequently sustained further injury to the extent of 7*s.* 6*d.* a head, or 10*s.* altogether, owing to the plaintiff having been guilty of unreasonable conduct in allowing them to remain in the truck all night without food, then the plaintiff is not entitled to recover the whole damage of 10*s.* a head, but he is not the less entitled to recover half-a-crown a head, the damage caused by the defendants' breach of contract, because he has himself by his unreasonable and improper conduct caused additional damage. If on the other hand when the calves arrived at their destination they would have sustained no injury if properly attended to, and a prudent and reasonable man ought to and would have had them so attended to, then the defendants' breach of duty has in fact caused no damage to the plaintiff, but the whole is due to his own unreasonable and imprudent conduct, and in that case he cannot recover anything.

We mention this to avoid any difficulty at the subsequent trial; but, as for the reasons given above we have no jurisdiction to hear the case, the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Wilkinson, Butler, & Wilkinson, St. Neots.*
Solicitor for defendants: *C. H. Mason.*

W. J. B.

Bengal Secretariat Library

C.A
1891
Aug. 4.

[IN THE COURT OF APPEAL.]

McNAIR & CO. *v.* AUDENSHAW PAINT AND COLOUR COMPANY, LIMITED.
HELLIWELL AND ANOTHER, CLAIMANTS.

Practice—Time for Appealing—Interpleader Issue, Judgment on—Interlocutory Order—Order LVIII., *r.* 15; *Order* LVII., *r.* 13.

An appeal from the decision of a judge on an interpleader issue tried by him without a jury must, under Order LVIII., r. 15, be brought within twenty-one days.

APPLICATION to strike an appeal out of the list, on the ground that it was brought out of time.

The facts were as follows. The plaintiffs, McNair & Co., had recovered a judgment against the defendants, the Audenshaw Paint and Colour Company, Limited, and issued execution, under which certain goods had been seized. The trustees for debenture-holders in the company claimed the goods under a mortgage deed.

Interpleader proceedings being taken by the sheriff, an order was made at chambers by which it was ordered that, upon payment into Court of 155*l.* by the claimants within seven days, or their giving security for the same, and upon payment of possession-money, the sheriff should withdraw from possession of the goods, and, unless such payment was made or security given, the sheriff should proceed to sell the goods and pay the proceeds into Court, after deducting expenses and possession-money, to abide further order; and that the parties should proceed to the trial of an issue to try the title to the goods as between the claimants and the execution creditors. The claimants did not pay the 155*l.* or give security for the same; so the goods were sold and the proceeds paid into Court.

At the trial of the issue before Lawrance, J., without a jury, on March 3, 1891, the learned judge found upon the issue that the goods seized were the property of the claimants in the issue as against the execution creditors, and directed that judgment should be entered for the claimants accordingly with costs. He

further directed that, if notice of appeal were given within fourteen days, there should be a stay of execution till the hearing. No notice of appeal was given within the fourteen days; but on June 22, 1891, the execution creditors gave notice of motion to the Court of Appeal, by way of appeal against the judgment given on the trial of the interpleader issue, whereby it was declared that the claimants were entitled to the goods, on the ground that the judge was wrong in law.

Ernest Radford, for the claimants. This appeal is out of time. Under Order LVIII., r. 15, the time within which an appeal against the judgment of a judge on an interpleader issue must be brought is twenty-one days. It was decided that that was so before the Rules of 1883, in *McAndrew* v. *Barker*. (1) The Rules of 1883 have not effected any change in this respect.

McCall, Q.C., and *John Andrew Hamilton*, for the execution creditors. It is submitted that this is a final judgment or order of such a nature that, under Order LVIII., r. 15, the time for appealing is a year. *McAndrew* v. *Barker* (1) was decided under the old Interpleader Acts, which were repealed by the Statute Law Revision and Civil Procedure Act, 1883, substituted provisions being made by the Rules of 1883, in Order LVII. It is submitted that the law, as it previously existed, has been altered by the rules. The Rules of 1883 now alone regulate interpleader proceedings. By Order LVII., r. 13, the judge at the trial may finally determine the rights of the parties to the interpleader proceedings, and dispose of the whole proceedings. Interpleader proceedings under the rules are an action within the meaning of the rules. Sect. 100 of the Judicature Act, 1873, defines an action as a "civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." The order of the judge substantially disposed of the whole of the proceedings; therefore the order of the judge was a final order in an action. In *Galland* v. *Burton* (2) an originating summons was held to be an action. If the contention for the execution creditors is not correct, this anomaly follows: that from the portion of the judge's judgment that disposes of the issue, the appeal must be within twenty-one

(1) 7 Ch. D. 701. (2) 30 Ch. D. 231.

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days; while from the portion of it that finally adjusts the rights of the parties, the appeal may be within a year.

[Kay, L.J. Is not the interpleader issue merely an interlocutory proceeding in another matter?]

It is submitted that *Hughes* v. *Little* (1) is irreconcilable with *McAndrew* v. *Barker* (2), and is an authority in favour of the execution creditors. If the appeal is out of time, the Court ought to extend the time for appealing under the circumstances of the case.

Ernest Radford, for the claimants, in reply. *Hughes* v. *Little* (1) has no application to the question within what time an appeal must be brought under Order LVIII., r. 15. The question there was as to the length of notice that must be given under Order LVIII., r. 3, on appeal against an order of the Divisional Court affirming a decision of a county court judge on an interpleader issue. The terms of the two rules are not analogous. [He cited on this point *Salaman* v. *Warner*. (3)] He argued that under the circumstances of the case the time for appealing ought not to be extended.

Bowen, L.J. This is an application on behalf of the claimants in an interpleader issue that an appeal against the judgment upon the issue, which has been set down by the execution creditors, should be struck out on the ground that the appeal was brought too late. The appeal is from the judgment of a judge on an interpleader issue which was directed at chambers. The contention on the part of the execution creditors is that the appeal is one which may be brought within a year, because it is either a final judgment or a final order in an action, for appealing against which a year's time is given by Order LVIII., r. 15. It would, in my opinion, be a most serious thing if that were so; because the result would be that no final settlement of the interpleader proceedings could safely be made during that period; whereas it is well known that one main object of the law of interpleader since the statute of William IV. has been that the proceedings should be prompt. The question is whether the

(1) 18 Q. B. D. 32. (2) 7 Ch. D. 701.
(3) [1891] 1 Q. B. 734.

true construction of the rules is as suggested. The case of *McAndrew* v. *Barker* (1) has distinctly decided that before the Rules of 1883 the appeal from the decision of the judge upon the issue in such a case was an appeal of such a nature that twenty-one days was the limit of time for appealing against it. It has been suggested that the law has been altered, that the practice of the Courts under the new legislation, which has substituted rules of court for the provisions of the statute formerly in force, has been different; and that the case of *Hughes* v. *Little* (2) has really overruled the law as laid down in *McAndrew* v. *Barker* (1), and decides that a year is the limit of time for appealing in such cases. As I have said, I think it would be a very serious matter if that were so. But, on examining the case of *Hughes* v. *Little* (2), I think that it decides nothing of the sort. It is a decision on Order LVIII., r. 3, which is the rule regulating the length of the notice of appeal to be given. It decided that, in the case of an appeal against the order of a Divisional Court, affirming the judgment of a county court judge on an interpleader issue, a fourteen days' notice of appeal was correct. The case does not touch, and was not intended to touch, the construction of Order LVIII., r. 15, which regulates the time for appealing; and therefore we may consider the question before us, undeterred from coming to what we may consider the right conclusion by any idea that *Hughes* v. *Little* (2) has decided that question. The decision in *McAndrew* v. *Barker* (1) is binding on us, unless there is something in the rules which alters the law as it existed at the time of that decision. It seems to me that there is nothing in the rules which does so, and therefore *McAndrew* v. *Barker* (1) remains, and I hope will continue to remain, the governing authority on the subject. It seems to me clear that the decision of the judge on an interpleader issue is not a final judgment. It is a decision in a proceeding which is in the nature of an interlocutory proceeding. The effect of the rules as to interpleader proceedings has been clearly explained in the cases of *Robinson* v. *Tucker* (3) and *Dawson* v. *Fox* (4). Those cases shew that no substantial change in the old law has been made. Under the

(1) 7 Ch. D. 701.
(2) 18 Q. B. D. 32.
(3) 14 Q. B. D. 371.
(4) 14 Q. B. D. 377.

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old Interpleader Acts the trial of the issue was only a step in the proceedings which regulated the rights of the parties. The complete adjustment of those rights took place at chambers subsequently to the trial of the issue; and, while the verdict of the jury on the issue could be reviewed on an application for a new trial, the ultimate adjustment of the rights of the parties at chambers was conclusive. Under the Judicature Act a practice was established by which the issue could be heard by a judge without a jury. His decision on the issue could be reviewed, as was also the case with the verdict of a jury; but the ultimate judgment at chambers remained conclusive. But there was an obvious inconvenience in having to go back to chambers when probably the judge at the trial, who had all the parties before him, could more conveniently make the ultimate adjustment of the rights of the parties. Therefore the rules now provide (Order LVII., r. 13) that the judge who tries the issue shall be clothed with the power of finally adjusting the rights of the parties, if he think fit to do so. He has, therefore, conferred upon him all the powers and functions of a judge at chambers for the purpose of disposing of the whole matter. That provision does not make the judgment on the issue any the less reviewable on the one hand; nor, on the other hand, does it make it a final judgment or a final order in an action for appealing against which, under Order LVIII., r. 15, a year's time is allowed. For these reasons, I think the time for appealing in this case was twenty-one days, and, therefore, this appeal was brought too late.

[The Lord Justice then dealt with the circumstances of the case as bearing on the question whether the time for appealing ought to be extended, and proceeded as follows:—] Under these circumstances I think there is nothing in the position or conduct of the parties to prevent our extending the time for appealing; and it seems to me that the case is one in which, in the interests of justice, there ought to be such an extension of time.

Kay, L.J. I also think that it would be a most serious matter if, in the case of an interlocutory proceeding in an interpleader matter, there could be an appeal at any time within a year

after the order was made. Before the Rules of 1883 this clearly was not so. It was decided in *McAndrew* v. *Barker* (1) that, if an issue was directed on interpleader proceedings, it was an interlocutory proceeding, and the time for appealing from the order made on the issue was only such as was given in the case of an interlocutory order. The only doubt and difficulty which I have experienced in the matter arose from another case, which occurred after the making of the Rules of 1883, and which for some time appeared to me hard to reconcile with *McAndrew* v. *Barker*. (1) I mean the case of *Hughes* v. *Little*. (2) On consideration, however, I think that that case is not in point, and does not overrule the law laid down in *McAndrew* v. *Barker*. (1) In *Hughes* v. *Little* (2), the objection taken was not that the notice of appeal had not been given in due time, but that the notice of appeal which had been given was bad, being a fourteen days' notice. The meaning of that is apparent, if we look at Order LVIII., r. 3, which provides that "notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice." So the objection was that the order was such that the appellant could not give a fourteen days' notice, but ought to have given a four days' notice. All that was decided was that the order in that case was a final order within Order LVIII., r. 3; but the case did not decide that the order of a judge on an interpleader issue was such an order that under Order LVIII., r. 15, the time for appealing against it was a year. Order LVIII., r. 15, provides that "no appeal to the Court of Appeal, from any interlocutory order, or from any order whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year." It seems to me clear that under the terms of that rule the time within which this appeal should have been brought was twenty-one days. Order LVII., r. 13, has been relied on for the claimants. That rule provides that Orders XXXI. and XXXVI. shall, with the

(1) 7 Ch. D. 701. (2) 18 Q. B. D. 32.

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necessary modifications, apply to interpleader issues, and that the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for; so that the judge who tries the issue may go on and finally dispose of the whole matter; but it does not follow that his decision on the interpleader issue is not an interlocutory order, so far as regards the time for appealing. In my opinion, this provision does not alter the practice which obtained before the Rules of 1883. Therefore, I think that the time within which this appeal ought to have been brought was twenty-one days.

I agree, however, with Bowen, L.J., that justice requires in this case that the time for appealing should be extended.

[It having been admitted by the counsel for the claimants that the judgment of the learned judge below could not be supported, the Court of Appeal having since reversed his decision in another case tried at the same time, raising the same point, it was agreed that the Court should dispose of the appeal as if it were the hearing, and the appeal was accordingly allowed.]

Appeal allowed.

Solicitors for claimants: *Rowcliffes, Rawle & Co.*, for *Robert Innes, Manchester.*

Solicitors for execution creditors: *Pritchard, Englefield & Co.*, for *W. E. Rowcliffe, Manchester.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1891
July 10.

REEVES *v.* BUTCHER.

Limitations, Statute of (21 *Jac.* 1, *c.* 16, *s.* 3)—*Cause of Action.*

The plaintiff lent money to the defendant under a written agreement, which recited an agreement for a loan for five years, "subject to the power to call in the same at an earlier period in the events hereinafter mentioned." The defendant agreed to pay interest quarterly, and the plaintiff agreed not to call in the money for five years if the defendant should regularly pay the interest. And it was provided that if the defendant should make default in payment of any quarterly payment of interest for twenty-one days the plaintiff might call in the principal. No interest was ever paid. The plaintiff commenced his action to recover the principal and interest within six years from the end of the term of five years:—

Held (affirming the decision of Day and Lawrance, JJ.), that the Statute of Limitations was a good defence, for that the time began to run from the earliest time at which the plaintiff could have brought her action—i.e., twenty-one days after the first instalment of interest became due.

Hemp v. *Garland* (4 Q. B. 519) approved.

By agreement, dated April 27, 1880, between the defendant and the plaintiff, reciting that the defendant had applied to the plaintiff to lend her the sum of 425*l.* 18*s.* "for a term of five years (subject to the power to call in the same at an earlier period in the events hereinafter mentioned) upon her personal security," which the plaintiff had agreed to do upon the defendant executing the now-stating agreement, the defendant agreed with the plaintiff that she (the defendant) would "duly and regularly pay to the plaintiff interest on the said sum of 425*l.* 18*s.* from the date of the agreement at the rate of 7*l.* per cent. by equal quarterly payments. And the plaintiff thereby agreed with the defendant that she would not call in the said principal sum, or any part thereof, during the term of five years from the date of the agreement, if the said defendant should so long live, and should duly and regularly pay the said interest: Provided always, that in case the said defendant should die before the expiration of the said term, it shall be lawful for the said plaintiff to call in the said principal sum upon giving to the executors or administrators of the said defendant six calendar months' previous notice in writing of her intention so to do:

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Provided also, that in case the defendant should make default in payment of any quarterly payment of interest as aforesaid for the period of twenty-one days next after the same should become payable, it should be lawful for the said plaintiff immediately upon the expiration of such twenty-one days to call in and demand payment of the said principal sum and all interest then owing or accruing in respect thereof."

No interest was ever paid under this agreement. The present action was commenced on February 13, 1891, to recover the principal and interest. The defendant pleaded the Statute of Limitations.

Day and Lawrance, JJ., ordered judgment to be entered for the defendant with costs, considering themselves bound by *Hemp* v. *Garland* (1) to hold that the Statute of Limitations began to run as soon as an instalment of interest was twenty-one days in arrear. The plaintiff appealed.

McCall, Q.C., and *Morton Smith*, for the plaintiff. The plaintiff was entitled, first, to bring an action for each instalment of interest as it became due; secondly, to bring an action for the principal and interest twenty-one days after an instalment of interest became due; thirdly, to wait till the expiration of the time, and then sue for the whole amount due. The intention of the parties was that the sum should remain on loan for five years, subject to a power of calling it in sooner if default was made in payment of interest. The plaintiff was not bound to call it in at once if default in payment of interest was made. A fresh right arose at the end of the time, and the action was brought within six years from that period. A similar point arose in *Hughes* v. *Palmer*. (2) The Divisional Court followed *Hemp* v. *Garland*. (1) But in that case there was an existing right of action before the warrant of attorney was given. The clause in the warrant which suspended the right to sue became inoperative by the defendant's default, and the parties were remitted to their original rights, so that the statute at once began to run. Here there was no right of action independently of the agreement, which only gave a right to sue at the end of five years, with an

(1) 4 Q. B. 519. (2) 19 C. B. (N.S.) 393.

option in certain events to call the money in sooner, which option, as no one is bound to take advantage of a forfeiture, the plaintiff was not bound to exercise, but was at liberty to wait till the end of the five years. If *Hemp* v. *Garland* (1) is not distinguishable, it is submitted that it is not good law and ought to be overruled. The defendant ought not to be allowed to take a benefit by her own default.

Loehnis, for the defendant, was not called upon.

LINDLEY, L.J. I am of opinion that we cannot differ from the judgment below without altering the law. The agreement is one reasonably easy to be understood. It provides for a loan for five years, subject to a provision that if default is made in punctual payment of interest the principal shall be recoverable at once. Now, the Statute of Limitations (21 Jac. 1, c. 16) enacts that such actions as therein mentioned, including "all actions of debt grounded upon any lending or contract without specialty," shall be brought "within six years next after the cause of such action or suit, and not after." This expression, "cause of action," has been repeatedly the subject of decision, and it has been held, particularly in *Hemp* v. *Garland* (1), decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

FRY, L.J. We have not to determine whether the defence here set up is handsome or conscientious, but whether it is good at law—and I am of opinion that it is. The agreement contains a stipulation that the lender shall not call in the principal sum for a period of five years, if the borrower should so long live, and should duly and regularly pay the interest. This implies a contract by the borrower that the principal should be paid at once on the death of the borrower, or on default in payment of interest. The subsequent provisoes imply a contract by the lender not to enforce payment after the death of the borrower

(1) 4 Q. B. 519.

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until the expiration of a six months' notice, and a contract not to enforce payment of the capital for default in payment of interest until twenty-one days after such default, thus giving the borrower further time. Subject to these stipulations, the implied contract to pay the principal remained in force. The principal, therefore, became payable twenty-one days after the first quarterly instalment of interest became due, and from that time the Statute of Limitations began to run. If authority is wanted, *Hemp* v. *Garland* (1) is in point.

LOPES, L.J. The defendant alleges that the cause of action arose more than six years before the action was commenced, and that the action is barred by the Statute of Limitations. Now, when first had the plaintiff a cause of action? When default was made for twenty-one days in payment of an instalment of interest. *Hemp* v. *Garland* (1) is in point. It is said that this case is not good law, and that it has not been referred to for many years. I think that it has not been referred to because it has been acquiesced in, and it does not appear that it has ever been questioned.

Appeal dismissed.

Solicitors: *Goldring; Marsland, Hewitt, & Urquhart, for W. J. Read, Blackpool.*

(1) 4 Q. B. 519.

H. C. J.

[IN THE COURT OF APPEAL.]

C. A

1891

April 22; *July* 10.

CITY AND SOUTH LONDON RAILWAY COMPANY *v.* LONDON COUNTY COUNCIL.

Metropolis—General line of Buildings—County Council—Railway Company—Compulsory Powers—Order of Justice for demolition of Building—Effect of acquisition of Land by Railway Company under special Act passed subsequently to Metropolis Management Amendment Act, 1862—*Metropolis Management Amendment Act,* 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*Metropolis Management and Buildings Acts Amendment Act,* 1882 (45 & 46 *Vict. c.* 14), *s.* 10—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 40, *sub-s.* 8.

A railway company was empowered by a special Act passed subsequently to the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), to make under a street in London a subway "with all necessary works connected therewith," and to take and use such of the lands delineated on the deposited plans, and described in the deposited books of reference as might be required for that purpose. The company built in the street within the limits of deviation a station, a part of which projected beyond the general line of buildings. This station was necessary for the purposes of the railway, and apart from the provisions of the Metropolis Management Acts was unobjectionable, but it could have been erected within the general line of buildings without any inconvenience except a considerable increase of expense:—

Held (affirming the decision of A. L. Smith and Grantham, JJ.), that the station being necessary, the special Act empowered the company to make it upon any of the scheduled lands lying within the limits of deviation; that the effect was to repeal s. 75 of the Metropolis Management Amendment Act, 1862, so far as related to the station, and that there was therefore no jurisdiction to make an order under that section for the demolition of the projecting part.

CASE stated by a metropolitan police magistrate at the instance of the City and South London Railway Company, to raise the question of the validity of an order made by him upon a complaint by the London County Council, directing the demolition pursuant to s. 75 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102) (1) of so much of

(1) By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75: "No building structure or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street . . . . notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being;

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the station of the company in Kennington Park Road, in the parish of St. Mary, Newington, Surrey, as was beyond the general line of buildings in such road.

It appeared that by s. 4 of the City of London and Southwark Subway (Kennington Extensions Act), 1887 (50 & 51 Vict. c. cv.), the appellants were empowered "to make and maintain in the lines and according to the levels shewn on the deposited plans and sections a subway consisting of two tunnels or archways for separate up and down traffic, to be approached by means of staircases and by hydraulic lifts, or by either of such means, with all necessary approaches, tunnels, shafts, hydraulic lifts, buildings, works, machinery, and conveniences connected therewith, and to enter upon, take and use such of the lands delineated on the deposited plans and described in the deposited book of reference, as may be required for that purpose." By s. 25, the appellants were authorized to deviate laterally within the limits shewn on the deposited plans. By s. 27 the appellants were required "not to make any approach to the subway or any permanent tunnel, shaft, or other work in such a manner as to interfere with the carriage or footway of any street, nor to make more than two temporary shafts or openings in the surface of any street in the parish of St. Mary, Newington, without the consent of the Metropolitan Board of Works, and of the vestry of the parish."

The part of the appellants' station which was beyond the general line of buildings in Kennington Park Road had been so erected without the consent of the respondents, within the meaning of s. 75 of the Metropolis Management Amendment Act, 1862, s. 10 of the Metropolis Management and Building Acts Amendment Act, 1882, and s. 40, sub-s. 8, of the Local Government Act, 1888. The part in question was within the limits of deviation, and was built upon the site of two gardens in front of houses near the corner at which New Street joins Kennington Park Road. The deposited plans shewed that the

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and in case any building structure or erection be erected, or be begun to be erected or raised, without such consent .... it shall be lawful for the vestry .... to make complaint thereof before a justice of the peace .... and if such complaint shall be proved .... such justice shall make an order in writing .... directing the demolition of any such building or erection."

appellants' subway ran under Kennington Park Road, and that near this corner were six plots of land which they were empowered to acquire compulsorily, five of them containing houses with gardens in front between the houses and the pavement of Kennington Park Road. The case stated that the appellants had taken three only of these plots, those nearest the corner, and that "upon the land so acquired they had constructed two shafts, in one of which was a spiral staircase, and in the other hydraulic lifts affording access to the underground platforms," and "over and adjacent to these shafts a station and buildings," of which the part beyond the general line of buildings in Kennington Park Road contained "the entrance door, which opened on to the pavement of Kennington Park Road, the booking offices, part of the waiting room from which the lifts were entered, and another room," and also that on a part of the land acquired the appellants had not erected any buildings or constructed any underground works.

The magistrate also found as follows: (1.) "If the company had acquired the two plots of land adjoining those they did acquire, they could have erected a station equally convenient as far as the building itself was concerned, of which the entrance would have been about thirty feet from the pavement of Kennington Park Road."

(2.) "It was necessary and convenient for the purposes of a railway that a station building should exist on some of the land at the corner of Kennington Park Road and New Street."

(3.) "The station building as it now exists, considered only as a station building, and without reference to the provisions of s. 75 of the Metropolis Management Amendment Act, 1862, is a reasonably convenient building."

(4.) "It is, however, not necessary for the purposes of the railway that any part of the station building should be erected beyond the general line of buildings in Kennington Park Road."

(5.) "It was convenient for the purposes of the railway that part of the station building should be erected beyond the general line of buildings in this respect, that the railway were thus able to save expense by acquiring less land for their

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approaches, shafts, buildings, works, and conveniences than would otherwise have been necessary."

(6.) "Except the inconvenience of extra expense to the railway company, I find that no other inconvenience whatever would have attached to a station building built wholly within the general line of buildings in Kennington Park Road, and that a station so built would have been as reasonably convenient as the station which now exists."

The order was made after the expiration of the time limited for the compulsory purchase of land by the appellants under their special Act of 1887.

W. Graham, for the appellants. The magistrate had no jurisdiction to make the order. The effect of the special Act is to empower the appellants at their own absolute discretion to build a station anywhere on the acquired land within the limits of deviation. The building of the station is therefore a matter altogether outside the operation of s. 75 of the Metropolis Management Amendment Act, 1862. The law with respect to the statutory powers of railway companies was thus defined in the House of Lords in *London and Brighton Railway Co.* v. *Truman* (1), and is there treated as having been well settled to this effect since *Rex* v. *Pease* (2), a case decided in 1832. The case of *London and Blackwall Railway Co.* v. *Limehouse District Board of Works* (3) is an express authority in the appellants' favour.

Lumley Smith, Q.C. (with him *R. Cunningham Glen*), for the respondents. Where a special Act is passed subsequently to an Act of general application, the later Act is not to be construed as repealing the earlier, unless it be necessary so to construe it. The two statutes are, if possible to be read together. Here there is no inconsistency, and the legislature must be taken to have intended that the station should be erected subject to the rules of the Metropolis Management Amendment Act, 1862, with respect to keeping within the general line. The case finds that there was no necessity for the deviation. That economy of construction is not the criterion of necessity in such cases appears

(1) 11 App. Cas. 45. (2) 4 B. & Ad. 30.
(3) 3 K. & J. 123; 26 L. J. (Eq.) 164.

from *Reg.* v. *Wycombe Ry. Co.* (1); *Fenwick* v. *East London Ry. Co.* (2); *Pugh* v. *Golden Valley Ry. Co.* (3) It is contended that the terms of s. 27 of the special Act shews that the legislature intended that the Metropolitan Board of Works should have jurisdiction over the stations of the company.

W. Graham, in reply.

A. L. SMITH, J. The question raised is whether or not the effect of s. 4 of the City of London and Southwark Subway Act, 1887, is, on its true construction, to repeal in part s. 75 of the Metropolis Management Amendment Act, 1862. I agree that, if the two sections can be read so as to stand together, they ought to be so read; but the matter really depends upon what is the true construction of the 4th section of the later Act. Now, put shortly, s. 75 of the earlier Act says, "You shall not build beyond a certain line without leave; or, in other words, you shall not build without leave on spot A." This is clear. Afterwards comes s. 4 of the later Act, and says to the appellants, "You may build on spot A a 'necessary' building." This also cannot be disputed. Now, does s. 4 of the later Act mean by a "necessary" building a building necessarily to be built on spot A, or a building necessary for the purposes of the undertaking? I think if s. 4 of the later Act is to be read in the second way, it must have the effect of repealing s. 75 of the earlier Act. It is argued for the respondents that the way to read s. 4 of the later Act is, "You may build on spot A any building which is necessarily to be built on that spot," and that, if this is so, then the learned magistrate has found that it was not necessary to build this station on that spot. But I do not think this is the right way to read the section. I think it means that the company may build on spot A any building necessary for the undertaking. The words are, "the company may make and maintain in the lines and according to the levels shewn on the deposited plans . . . the subway with all necessary works, &c., connected therewith," i.e., connected with the subway. I think this means, "You may build a subway within the lines of deviation in the centre of the street, and you

(1) Law Rep. 2 Q. B. 310. (2) Law Rep. 20 Eq. 544.
(3) 12 Ch. D. 274.

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may build all necessary works connected with the subway within the lines of deviation." If this be the meaning, as I think it is, of s. 4 of the later Act, I am of opinion that s. 4 of the later Act is absolutely inconsistent with s. 75 of the earlier Act, and that the latter section is therefore so far repealed by the former. Our judgment ought therefore, in my opinion, to be for the appellants. I say nothing as regards s. 27 of the special Act. I am by no means certain that the respondents are not right as regards that section. The ground of my judgment is that the true way of reading s. 4 of the City of London and Southwark Subway Act, 1887, is as I read it, and that the result is so far to repeal s. 75 of the Metropolis Management Amendment Act, 1862.

GRANTHAM, J. I am of the same opinion. The whole question turns on what is the meaning of the word "necessary" in the 4th section of the special Act. As to this I agree with what has been said by my learned brother. I think, too, that the 27th section has an important bearing on the matter. I must say that I cannot accept the interpretation put upon that section by the learned counsel for the respondents. If it had been intended that the appellants should not have the power of building beyond the general line of buildings in this road, I think the Metropolitan Board of Works would have taken care that this section should contain some additional provision enabling them to interfere. My reading of the special Act is that it was intended that the railway company should have power to erect within the limits of deviation the necessary buildings for their station, and that it should not therefore be in the power of the Metropolitan Board of Works or the London County Council to say, "You shall not build within the limits of deviation; you shall only build according to the old general Act." But even if I did not think this the right view, I should, in my opinion be bound to give this decision on the authority of *London and Blackwall Ry. Co.* v. *Limehouse District Board of Works.* (1) That case was decided in Chancery in 1856, and cannot, as it appears to me, be distinguished from this case. Here the powers of the Metro-

(1) 26 L. J. (Eq.) 164.

politan Board of Works have become vested in the London County Council by virtue of Acts, one passed prior to, the other subsequently to, the passing of the railway company's special Act. In that case the Commercial Road trustees had power to prevent the land being used as the railway company wished to use it. Then the Metropolitan Management Act 1855 vested the jurisdiction of the Commercial Road trustees in the Metropolitan Board of Works. Before the passing of the special Act the Board had admittedly power to limit the use of the land. Then came the special Act, which gave the railway company power to deal with the land in a manner inconsistent with the powers of the old Commercial Road trustees. It was held by Wood, V.C., that the special Act must be taken to have overridden these powers among other reasons, because, as he said: "I must take the trustees either to have been present, or to have had the power to be present at the time the Act was passed, and to have had an opportunity, if they had thought fit, of preventing any dealing with the property, which they must have known to have been close to the road which was vested under their control, and they might then, if they had thought fit, have insisted upon having the same power over it as had been given them by their general Act." So, here, when these powers were given to the appellants, the Metropolitan Board of Works were present for the purpose of seeing, as was their duty, that the public roads and footpaths were not interfered with by the railway. The result was that the Board obtained powers as regards the streets under s. 27, but that nothing was said in the section as to these gardens, no doubt because they were within the limits of deviation.

Judgment for the appellants.

H. D. W.

The London County Council appealed from this decision.

Lumley Smith, Q.C., and *R. Cunningham Glen*, for the appeal. The magistrate has found as a fact that there was no necessity to carry the station beyond the building line; it was only done because it saved expense to the company. The maxim "Generalia

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specialibus non derogant" has been commonly applied where the first Act is the special one; but if the two can stand together they will be construed so as to make them consistent: Maxwell, Interpretation of Statutes, 2nd ed. p. 186. In *Reg.* v. *Wycombe Ry. Co.* (1) it was held that the diversion of a road which saved expense to the company, but was not otherwise necessary for the construction of the railway, was not authorized by 8 & 9 Vict. c. 20, s. 16; and in *Fenwick* v. *East London Ry. Co.* (2) it was held that an Act was not "necessary," because it enables the company to execute their works more economically. This was approved by the Court of Appeal in *Pugh* v. *Golden Valley Ry. Co.* (3) The respondents relied on two cases. One was *London, Brighton, and South Coast Ry. Co.* v. *Truman* (4); but the decision there went on the express power given to the company to do the act complained of: see p. 54. The other was *London and Blackwall Ry. Co.* v. *Limehouse District Board of Works* (5); but there it was only held that a subsequent general Act did not interfere with the powers specially given by a previous special Act: *Attorney General* v. *Eastern Counties Ry. Co.* (6) went on the words "reasonably convenient." In *Lord Provost, &c., of Glasgow* v. *Farie* (7), Lord Macnaghten (p. 689) refers with approval to the decisions on s. 16 of the Railway Clauses Act as to putting a strict construction on the word "necessary."

Finlay, Q.C., and *Graham*, for the respondents. The 4th section of the special Act gives power to take land and to erect all buildings necessary for the purposes of the railway. If a building is necessary for the purpose of the undertaking the company can erect it on any part of the land they acquire, and this special power is not affected by a general Act. The case of *London and Blackwall Ry. Co.* v. *Limehouse District Board of Works* (5) is precisely applicable to the present case. *Attorney General* v. *Eastern Counties Ry. Co.* (8) shews that companies have a discretion in such cases. [They were stopped by the Court.]

(1) Law Rep. 2 Q. B. 310.
(2) Law Rep. 20 Eq. 544.
(3) 15 Ch. D. 330.
(4) 11 App. Cas. 45.
(5) 3 K. & J. 123.
(6) 10 M. & W. 273.
(7) 13 App. Cas. 657.
(8) 2 Ry. Cases 823.

Lumley Smith, Q.C., in reply.

Lindley, L.J. This case turns upon the joint effect of the Metropolis Management Act 1862, and the City and South London Railway Company's Special Act of 1887. The general Act, which is first in point of date, by s. 75, prohibits generally the erection of buildings beyond the general building line of a street without the consent of the local authority.

The question is whether the special railway Act has authorized the plaintiffs to make a station at the corner of New Street and Kennington Park Road in the way in which they have constructed it—that is to say, with a portion of it, and particularly the booking offices, projecting beyond the general line of buildings in that locality. The defendants, the London County Council, say we ought to read and construe the two Acts together if possible, so as to make them harmonise. I agree entirely in that, and the other side do not dispute it; but they say, and A. L. Smith, J., and Grantham, J., have taken their view, that upon the true construction of the special Act it is impossible to read the special and the general Acts together in such a way as to make them harmonise. The special Act defines by s. 3 what is called the subway, which means the subway and works; s. 4, which is the main section, runs thus—"subject to the provisions of this Act the company may make and maintain in the line and according to the levels shewn on the deposited plans and sections the subway hereinafter described, with all necessary approaches, tunnels, shafts, hydraulic lifts, buildings, works, machinery, and conveniences, connected therewith, and may enter upon, take and use such of the lands delineated on the deposited plans and described in the deposited books of reference as may be required for that purpose." The question is what is the construction of that section, what is the meaning there of the word "necessary," and what is the meaning of the expression, "as may be required for that purpose."

It appears to me that the view taken of the word "necessary" by the Divisional Court is the right one—that is to say, that necessary works mean works necessary for the purposes of the undertaking, without reference to any particular position of those

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works, provided they are within the lines shewn on the deposited plans. Within those lines they have power to make all works which are necessary for the purposes of their undertaking. The subsequent words, "and may enter upon, take, and use such of the lands delineated on the deposited plans and described in the deposited books of reference as may be required for that purpose," appear to me to mean that the company are to be the judges, acting honestly and bonâ fide, of what they require for the purpose. The limit set by the Act of Parliament is set geographically by the lines delineated on the plan, and is set also by the condition that every structure shall be necessary for the purposes of the undertaking. The learned magistrate has found, first of all, what I conceive to be of the utmost importance to the plaintiffs, that "it was necessary and convenient for the purposes of a railway that a station building should exist on some of the land at the corner of Kennington Park Road and New Street delineated on the deposited plans"—that is to say, it was necessary and convenient, and therefore it was perfectly lawful to have a station there. Then he says: "The station building, as it now exists, considered only as a station building and without reference to the provisions of 25 & 26 Vict. c. 102, s. 75, is a reasonably convenient building"—that is to say, that the company have built it in a reasonable way, and that the buildings which they have erected are reasonably required. So far, therefore, everything that they have done seems to me to be warranted, and to be found by the magistrate to be warranted, by s. 4. Then he finds this: "It is, however, not necessary for the purposes of the railway that any part of the station building should be erected beyond the general line of buildings in the Kennington Park Road." Then he says, "except the inconvenience of extra expense to the railway company, I find that no other inconvenience whatever would have attached to a station building built wholly within the general line of building in Kennington Park Road, and that a station so built would have been as reasonably convenient as the station which now exists." Upon these findings that controversy arises.

Now it appears to me that if we adopt the construction which I have put upon s. 4, and which I think is the right one, and

yet were to accede to the contention of the appellants, we should be saying this, that although you, the railway company, are erecting within the limits authorized by the Act of Parliament a building necessary for the purposes for which you are authorized to take land, yet it lies in the power of the County Council to dictate to you exactly the position in which you shall put your various offices, and the mode in which you shall construct your various buildings. That appears to me not to be the true construction of the Acts of Parliament. In my opinion, if you find that the buildings which the railway company are erecting are buildings necessary in the sense I have mentioned, necessary for the purposes of their undertaking, it is not within the power of the County Council to dictate to them how in particular they shall arrange their buildings, and how in particular they shall construct them. For example, in this particular case they cannot say—"you shall take your offices off the frontage and put them behind on those other three houses out of the six which you declined to buy"; and to my mind it is no sufficient ground that the company might have done so just as conveniently for working purposes, though not so cheaply. Suppose those three houses were very much more expensive than the first three, was that to be left out of account by the engineers and surveyors who were acting for the railway company? It appears to me that it was not. The company, in my opinion, are within their powers, and this is made plainer by the limitation put on their powers by s. 27. If s. 4 of this Act were taken alone, then, inasmuch as the Railway Clauses Act is not incorporated, there is nothing that I can see to prevent this railway company from building over the thoroughfare, over the causeway, over the street. That is guarded against by s. 27. There is a clause, therefore, limiting their powers as to the street, but not limiting their power as to the gardens on which they erected the structure which interferes with the general line of building.

It appears to me, therefore, that upon the true construction of this section the appellants are wrong.

The appellants rely very much upon a line of cases of which *Reg.* v. *Wycombe Ry. Co.* (1) is the best known—to the effect that

(1) Law Rep. 2 Q. B. 310.

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a work is not "necessary" merely because it will save expense. But none of those cases turned on the particular mode of doing a thing that was necessary, but upon the question whether it was necessary to do the thing itself. That is the kind of question which the Courts have discussed in those cases; but when once you have found, as the learned magistrate here has found as a fact, that a station is necessary, and the station is within the limits set by the 4th section, there is no authority which requires us to decide that the expense is to be disregarded, and that the County Council can say, "As there is no objection to putting your buildings behind the building line except that it will be more expensive, you must put them back." That appears to me to be the subject of the controversy. I confess that the argument for the appellants appeared to me very convincing until I had the opportunity of considering the judgment of A. L. Smith, J., which I am now satisfied is right.

Fry, L.J. At the time this Act of 1887 was passed, a building line was in existence on the Kennington Park Road. That being the state of things, the legislature clothed the railway company with a power of this description. It enabled them to make and maintain the subway, and all necessary buildings. Now, it is undoubted upon the finding of the magistrate that a building in the nature of a station at or about the place where it has been erected by the defendant company is necessary for the purposes of the undertaking, and that is the way in which I read the word "necessary" in s. 4. The station, then, is a necessary building. Then this section provides that the railway company may enter upon, take, and use such of the lands delineated on the deposited plans, and described in the deposited book of reference, as may be required for that purpose. The company, therefore, may take and use such of the scheduled lands as may be required —that is to say, as they in an honest discretion may deem to be requisite for the purpose—for the purpose in this case of erecting a station. The lands comprised in the schedule or book of reference were partly lands within and partly lands without the building line, and yet the legislature has said that they may take any. Therefore there are two kinds—lands within and lands

without the building-line, any of which may be taken for the purpose of the building. It is obvious, therefore, to my mind that that clause is inconsistent with the general statute, unless you can hold that it must be read subject to a proviso that nothing therein contained shall enable the company to build upon one of the two classes of lands which appear in the book of reference, viz., those which are without the building line. Now, to add that proviso to s. 4 would be to alter it, and to alter it in a material respect. I agree with what has been said by the Lord Justice that the difficulty of adding such words is increased by the subsequent sections of the Act, which provides in particular cases for the exception of lands comprised in the book of reference from the right to build upon them. For instance, the company cannot build upon the footway or upon the carriageway of the road. The very fact that the carriageway and roadway are mentioned, and the land up to the building line is not mentioned, is striking, and tends to confirm the conclusion that the legislature meant what it seems to have said, viz., to enable the railway company to erect the necessary buildings upon the lands mentioned in the schedule, which comprise lands outside the building line.

For this reason I think the judgment must be affirmed.

LOPES, L.J. During the argument for the appellants I had great doubt what the proper decision in this case was; but when I heard the judgment of A. L. Smith, J., I arrived at the conclusion that the appeal could not be maintained. The findings of the police magistrate are most important in this case. He finds, and it is to my mind the all-important finding, that this station is necessary for the undertaking somewhere on the scheduled lands. He also finds, no doubt, that it is not necessary that the station should be put in the particular position where it has been placed, and he also finds that it is placed in the particular position where it is now found to save the respondents, the railway company, incurring the expense of buying other scheduled lands. Those are the material findings. The first one, to my mind, is the all-important one—I mean that in which the police magistrate finds that the station is necessary

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for the undertaking somewhere on the scheduled lands. Directly you get that it is only necessary to read the subsequent part of s. 4, which says that the company "may enter upon, take, and use such of the lands delineated on the deposited plans and described in the deposited book of reference as may be required for that purpose." That to my mind means this—may take and use such portion of the lands delineated in the deposited plans and described in the books of reference as may be required for that purpose—that is, for the station which the magistrate finds it to be necessary for the purposes of the undertaking to erect upon some part of that scheduled land. I think that the construction which I put upon this section makes it inconsistent with the general statute. I think, therefore, the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Fowler & Co.*
Solicitor for respondents: *W. A. Blaxland.*

H. C. J.

June 29; July 9

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Revenue—Duties on Settlements of Personal Property—Voluntary Settlement—Instrument not taking effect as a Will—Marriage Settlement—Power of Appointment—Customs and Inland Revenue Acts, 1881 (44 & 45 *Vict. c.* 12), *s.* 38; 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

By 44 & 45 Vict. c. 12, s. 38, stamp duties are imposed in respect of accounts delivered of personal property, including any property "passing under any past or future voluntary settlement" made by any person dying on or after June 1, 1881, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life is reserved to the settlor; and by 52 & 53 Vict. c. 7, s. 11, the expression "voluntary settlement" includes any trust in favour of a volunteer, whether the deed or instrument effecting the settlement was made for valuable consideration or not as between the settlor and any other person.

By a settlement made in consideration of marriage, H. transferred personal property to trustees upon trust to pay the income to herself for life; and, if certain events should happen, after her death upon trust for such person or persons as she, notwithstanding coverture, might appoint. The events happened, and H. died in 1888, having, during her coverture, by deed exercised the power of appointment in favour of a niece:—

Held, that the property so appointed to the niece must be taken to be

property "passing under" the marriage settlement; that the settlement and deed of appointment constituted a voluntary settlement whereby a life interest was reserved to the vendor within the meaning of s. 38 of 44 & 45 Vict. c. 12, and therefore that duty was payable in respect of such property.

INFORMATION by the Attorney General praying (inter alia) that it might be declared that certain personal property subject to the trusts of an indenture of settlement dated August 30, 1843, was liable to be included in an account to be delivered pursuant to s. 38 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), and chargeable with duty according to the value of such property, and that the defendants, as trustees of the settlement, might be ordered to pay the amount of the duty to the Receiver General of Inland Revenue.

The following statement of the material facts appearing from the information, and the defendants' demurrer and answer thereto, is taken from the judgment delivered by Wills, J. (post, p. 531):—

By a marriage settlement, dated August 30, 1843, Hester Fitzgerald (then Hester Haddan) transferred to certain trustees a sum of 1056*l.* 16*s.* 1*d.*, 3 per Cent. Consolidated Bank Annuities, upon trust (so far as is material) to pay the income thereof to the said Hester for life for her separate use without power of anticipation, and after her death to John Fitzgerald, the intended husband, for life, and after the determination of both life estates for the benefit of the children of the marriage as might be appointed in manner therein specified, and in default thereof for the benefit of such children, and failing those trusts upon trust for such person or persons as the said Hester Fitzgerald might, notwithstanding coverture, appoint. In the events which happened, the last-mentioned power of appointment became operative, and under it the said Hester Fitzgerald, on August 30, 1848, executed a deed whereby she appointed the said trust funds after her own and her husband's deaths to or for the benefit of her niece, Elizabeth Chapman. The proceeds of the sale of certain real property became, under the provisions of the marriage settlement of 1843, subject to the trusts applicable to the said sum of Consolidated Bank Annuities, and were included in the trust funds so appointed as aforesaid to Elizabeth

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Chapman. The said John Fitzgerald died in 1879, and the said Hester Fitzgerald in 1888.

Sir Richard Webster, A.G., and *Vaughan Hawkins*, for the Crown. The personal property appointed to Elizabeth Chapman by the deed of appointment of August 30, 1848, is property which passed under a voluntary settlement whereby a life interest was reserved to the settlor within the meaning of s. 38 (*c*) of the Customs and Inland Revenue Act, 1881, and the defendants are therefore liable to pay, in respect of it, the stamp duties imposed by that section. The marriage settlement of August 30, 1843, and the deed of appointment of August 30, 1848, must be treated as one instrument; or, if the deed of appointment be treated as a separate instrument, it must be read subject to the wife's life interest created by the marriage settlement. What was done under the power of appointment given by the marriage settlement must be taken to have been done under the marriage settlement. In *Braybrooke* v. *Attorney General* (1) the House of Lords held that a deed executing a power of appointment, and a prior disentailing deed by which that power was created, must be taken as having been executed on the same day for the purpose of determining the liability to succession duty under 16 & 17 Vict. c. 51, s. 4. Lord Campbell, L.C. (at pp. 166, 167), says: "Although nine years intervened between the two deeds, I think they are to be construed as if they had both been executed on the same day, and that in truth they constitute one disposition. What is done under a power of appointment is to be referred to the deed by which the power was created." Lord Kingsdown (at p. 182) states the rule thus: "In the first place, as regards the form of the conveyance by the execution of a joint power, the general rule of law is that limitations created by the execution of a power must be read as if they were introduced into the deed creating the power"; and in *Charlton* v. *Attorney General* (2) Lord Selborne says that in *Lord Braybrooke's Case* (1) the judgment of the House of Lords "proceeded upon the principle that the appointment was to be read into the deed creating the power,

(1) 9 H. L. C. 150. (2) 4 App. Cas. 423.

according to the general rule of law applicable to the execution of powers." By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1), the description of property marked (c) in s. 38 of the Act of 1881 "shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person." It is clear, therefore, that in the present case the consideration moving between the parties to the marriage settlement did not prevent this being a voluntary settlement with respect to persons on whom the property devolved, and Elizabeth Chapman was clearly a volunteer.

Meadows White, Q.C., and *Tyrrell Paine*, for the defendants. Upon the true construction of s. 38 of the Customs and Inland Revenue Act, 1881, the property in question "passed under" the deed executing the power of appointment, and as that deed reserved no life estate to the grantor the provisions of s. 38 do not apply to create any liability to pay the duty claimed. The test is, which of the two deeds passed the property, not under which deed was the disposition of the property. The object of the Act was to include cases in which probate duty was not paid, such as the case of donatio mortis causâ, which is the first description of property in s. 38. The Act was not intended to apply to the bonâ fide exercise of a power such as this. It is not within the mischief of the Act, which was aimed at settlements which were purely voluntary. The Customs and Inland Revenue Act, 1881, applies to the whole of the United Kingdom, and the words "passing under" in s. 38 must be construed, not with reference to any technical rule of conveyancing, but according to their ordinary and popular meaning. The rule of construction to be applied is stated by Lord Campbell in *Lord Saltoun* v. *Advocate-General* (1), thus: "In construing the statute (16 & 17 Vict. c. 51) on which this case depends, we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the legislature must be understood to be that the like

(1) 3 Macq. 659, at p. 671.

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interests in property taken by succession should be subjected to the like duties wheresoever the property may be situated. The technicalities of the laws of England and Scotland, where they differ, must be disregarded, and the language of the legislature must be taken in its popular sense." The cases of *Braybrooke* v. *Attorney General* (1), and *Charlton* v. *Attorney General* (2), relied on by the Attorney General, do not apply here. They were decided on the Succession Duty Act (16 & 17 Vict. c. 51), and turned upon what was the deed under which the disposition of the property was made, and the construction was applied which Lindley, J., in *Attorney General* v. *Mitchell* (3), calls "a conveyancer's construction," namely, that the execution of a power of appointment must be referred to the original deed which created it. It does not appear that this "conveyancer's construction" exists in the law of Scotland. In substance, the execution of a general power of appointment, at any rate so far as the appointor is concerned, is the deed by which the property passes: *Attorney General* v. *Upton* (4); *In re Van Hayan.* (5) For many purposes a general power of appointment is treated as property. There is a resulting trust to the donee of the power if the appointment fails; and a power of appointment is treated as property by the Wills Act (7 Wm. 4, and 1 Vict. c. 26, s. 27), and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44. If the property "passed under" the deed of appointment, it did not pass subject to the life estate created by the marriage settlement. The deed executing the power did not reserve a life interest in the property to the settlor within s. 38. The words "subject to" in that deed are merely descriptive. The settlor could not reserve a life interest by it, because that had been already done by the prior settlement. You cannot reserve a thing to yourself unless you have power to deal with it, and Mrs. Fitzgerald could not have dealt with her life interest either before or after her husband's death.

Sir Richard Webster, A.G., replied.

Cur. adv. vult.

(1) 9 H. L. C. 150.
(2) 4 App. Cas. 423.
(3) 6 Q. B. D. 548, at p. 555.
(4) Law Rep. 1 Ex. 224, judgment of Pollock, B., at p. 229.
(5) 16 Ch. D. 18.

July 9. The judgment of the Court (Denman and Wills, JJ.) was delivered by

WILLS, J. (who after stating the facts as set out (ante, p. 527), proceeded as follows):—The question is whether, under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. (*c*), as amended by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, the duties mentioned in s. 38 were payable, on the death of Hester Fitzgerald, in respect of the personal property which then passed by virtue of the two deeds in question to Elizabeth Chapman. The 44 & 45 Vict. c. 12, s. 38, sub-s. (*c*), renders liable to duty "any property passing under any past or future voluntary settlement, made by any person by deed or any other instrument not taking effect as a will whereby an interest in such property for life is reserved to the settlor" (words not affecting the present case have been omitted). The 52 & 53 Vict. c. 7, s. 11, enacts that "the description of property" comprised in the above words, "shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer; and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person."

Elizabeth Chapman was clearly a volunteer within the meaning of this enactment. If the deed of 1848 be regarded, the proposition is self-evident. If the marriage settlement be regarded, she is not within the consideration of the marriage, and, therefore, a volunteer: see *In re Cameron & Wells* (1), decided by Kay, J., and the expression "voluntary settlement" in 44 & 45 Vict. c. 12, s. 38, sub-s. (*c*), therefore, so far as it applies to this case, includes a trust in her favour in whichever deed contained. But in order that the duty may be payable, it is necessary that the settlement should be one by which a life estate shall have been reserved to the settlor, and, therefore, since the deed of appointment reserved nothing to the appointor, the duty is not payable unless within the meaning of the sub-section the

(1) 37 Ch. D. 32.

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property in question "passed under" the deed of 1843. The expression "passed under" is not a phrase of art in the same strict sense in which "devise," "grant," "estate in fee," "remainder," and a host of others having exact and uniform technical significations would be properly so termed. It is a phrase of a comprehensive nature, and we think it may fairly be used in respect not only of dispositions which are effected by the words of the instrument creating them but of those which are effected by the subsequent execution of a power created by the instrument in question. A deed of appointment would do nothing of itself, and only owes its vitality to the instrument creating it. It is surely, under such circumstances, no stretch of language to say that property, the right to direct the application of which is created by deed A, but the specific direction of which is effected by deed B, passes *under* (not *by*) deed A. When we look at the objects of the Act there seems to be strong reason for such a construction. The end aimed at seems to be to ensure that the equivalent to legacy duty shall be payable where various devices might, and otherwise would, be resorted to which would enable a person beneficially interested practically to make a will without liability to legacy duty. Here legacy duty would have been payable if this property had belonged in the ordinary way to Mrs. Fitzgerald, and had been by her will left to Elizabeth Chapman. But instead of having an absolute proprietary right she had practically the same thing in the shape of a general power of appointment. By exercising that power she effected the same result as if she had made a will. It would be a hardship upon persons who have to pay legacy duty if, because the whole beneficial interest in the property existed in the form of the right to exercise a general power of appointment to take effect on the death of the donee of the power, no duty equivalent to legacy duty should be payable upon the devolution of the property to the person to whom it was appointed. We have been urged to regard the language of the sub-section as used in a popular sense, and without reference to English doctrines as to the relation between deeds containing powers and interests created by the exercise of the powers, on the ground that the Act applies to the whole of the United Kingdom. In what has

been said we have done so; for the observation that the appointment would have no effect but for the power certainly cannot be affected by any peculiarity of Scotch law. If there exists, whether in Scotland or anywhere else, the possibility of creating and exercising a power, this amount and kind of relationship between the instruments by which the power came into being and that by which it was exercised must exist. But we doubt whether in the present instance the argument is a sound one. *Charlton* v. *Attorney General* (1) was a case under the Succession Duty Act (16 & 17 Vict. c. 51, s. 4), and was in the House of Lords. Sect. 4, which, like the present Act, applies to Scotland as well as to England and Ireland, speaks of a general power of appointment and of the exercise of such a power. Not only in *Charlton* v. *Attorney General* (1), but also in *Lord Braybrooke's Case* (2), and in *Floyer's Case* (3), and in *Smythe's Case* (4), the English doctrine that the appointment is to be read into the instrument creating the power was applied in construing the section in question of the Succession Duty Act. The law lords who were concerned in those various decisions were Lords Campbell, Kingsdown, Wensleydale, Cranworth, Cairns, Hatherley, and Selborne. We take this fact to be pretty nearly conclusive that no substantial difference between the law of Scotland and that of England on the matters affecting this question has ever been pointed out; and if the House of Lords on three several occasions has applied in respect of succession duty the principle that the interest created by the power must be treated as arising under the deed creating the power, there would be abundant justification for our applying it to a question arising under 44 & 45 Vict. c. 12. We think it ought to be so applied; and, for the reasons already given, we think it clear that, without resort to that doctrine, the Crown is equally entitled to judgment.

Judgment for the Crown.

Solicitor for Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendants: *White, Borrett & Co.*

(1) 4 App. Cas. 427.
(2) 9 H. L. C. 150.
(3) 9 H. L. C. 477.
(4) 9 H. L. C. 497.

W. A.

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[IN THE COURT OF APPEAL.]

WIEDEMANN *v.* WALPOLE.

Breach of Promise of Marriage—Corroboration of Promise—Omission to answer Letters, Effect of—32 & 33 Vict. c. 68, s. 2.

In an action for breach of promise of marriage, the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was held no evidence corroborating the plaintiff's testimony in support of such promise within the meaning of 32 & 33 Vict. c. 68, s. 2.

MOTION to enter judgment for the defendant on one of the issues in an action tried before Pollock, B., and a jury.

The action was brought to recover damages for the breach of the defendant's promise to marry the plaintiff; to recover damages for libel, and to recover the amount of expenses incurred by the plaintiff in making certain journeys at the defendant's request. The defendant pleaded a denial of the promise to marry, and of the libel, and further, that the occasion of publishing the alleged libel was privileged. At the trial the following facts were proved with respect to the alleged promise of marriage. In September, 1882, the defendant met the plaintiff at an hotel in Constantinople. He had sexual intercourse with her there, and remained with her a few days, giving her 100*l.* when they parted, and, according to her evidence, he promised whilst their intimacy was going on to marry her. In November, 1882, the plaintiff went to an hotel in Cannes, where she met and conversed with the defendant's mother, and the plaintiff alleged that she went from Constantinople to Cannes by the arrangement of the defendant, and in order to be introduced to his mother. The plaintiff produced at the trial copies of letters written by her to the defendant subsequently to her meeting with his mother, the first being a letter of November 27, 1882, written from the hotel at Cannes, in which letters she stated that he had promised to marry her. The plaintiff also produced a copy of a letter, dated January 3, 1883, and written to the defendant by her brother-in-law, a burgomaster of Nordhausen. This letter contained no reference to the alleged promise of

marriage, but asked the defendant to communicate his intentions and resolutions for the future of the plaintiff as soon as possible, and said that the defendant must have considered that the compromised honour of the family could not be received without further explanation. The plaintiff further produced a copy of a letter written to the defendant about February 3, 1884, by the pastor of the German Church at Sydenham, asking the defendant whether he intended to fulfil his promise to marry the plaintiff, and threatening that the writer would see by means of the law and the press that justice was done to his countrywoman. The defendant did not answer any of these letters. The plaintiff also produced the defendant's signet-ring, and alleged that he gave it to her at the hotel at Constantinople. He, on the other hand, alleged that the ring dropped on the floor of the dressing-room, and that she picked it up, and did not return it to him. At the close of the plaintiff's case, Pollock, B., ruled that the fact of the defendant not having answered the letters was such material evidence in corroboration of the promise as was required by 32 & 33 Vict. c. 68, s. 2, and declined to enter judgment for the defendant on the issue of breach of promise of marriage. The defendant was called, and admitted having received the letters, and that the copies produced were substantially correct. The jury found a general verdict for the plaintiff for 300*l.* on all the issues. The defendant now moved to have judgment entered for himself on the issue of breach of promise of marriage.

Lockwood, Q.C., and *W. Graham*, for the defendant. The letters in question were not evidence in corroboration of the plaintiff's testimony within 32 & 33 Vict. c. 68, s. 2, which provides "that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." The mere fact that a man does not answer a letter from a woman alleging that he has promised to marry her is no evidence that he admits the allegation. The facts in *Bessela* v. *Stern* (1), which may be relied on for the plaintiff, distinguish that case from this. The defendant had been taxed

(1) 2 C. P. D. 265.

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with his misconduct by the plaintiff's sister, and subsequently the sister overheard a conversation between the plaintiff and the defendant, in which she said, "You always promised to marry me, and you don't keep your word," and he did not deny the promise, but said he would give her some money to go away. The judgment proceeded on the ground that, as the defendant did not deny the promise when he had that opportunity, there was some evidence in corroboration of it. The present case differs from mercantile cases where there is a correspondence with respect to some business matter in which negotiations are being carried on between the parties. It may be that the omission to answer one letter out of a series in such a correspondence, having regard to the surrounding circumstances, is some evidence of an admission of the truth of what is stated in the letter; but here there are no circumstances which ought reasonably to lead any one to such a conclusion. No inference ought to be drawn from a person not answering a letter unless the parties are in such a relation that an answer might properly be expected: *Richards* v. *Gellatley* (1), and *Felthouse* v. *Bindley*. (2)

Thomas Terrell, (*E. F. C. Philips*, and *Warraker*, with him), for the plaintiff. The defendant's omission to answer the letters was some evidence for the jury of corroboration. It is for the jury to say whether the evidence is material. In *Wilcox* v. *Gotfrey* (3), Bramwell, B., at nisi prius, ruled that the fact that the defendant did not go into the witness-box to deny the promise was some evidence of corroboration, and he left to the jury the question whether the evidence corroborated the promise.

[KAY, L.J. Bramwell, B., agreed with the rest of the Court of Exchequer when the case came before that Court. (4) It seems doubtful whether his observations at the trial can have been correctly reported.]

The fact that the defendant gave the plaintiff his signet-ring is also some evidence in support of her statement that he promised to marry her. Taking all the circumstances together, there was

(1) Law Rep. 7 C. P. 127, per Willes, J.
(2) 11 C. B. (N.S.) 875.
(3) 26 L. T. (N.S.) 328.
(4) 26 L. T. (N.S.) 481.

some material evidence for the jury corroborating her testimony with respect to the promise.

Lockwood, Q.C., replied.

LORD ESHER, M.R. The first and main question to be decided in this case is a question of law, and I shall give no opinion upon any other questions in dispute between the parties. The point of law is whether in such a case as this—where nothing has happened beyond what has happened here—the mere fact of the defendant not answering any of the letters which have been brought before us is any such evidence in corroboration of the promise to marry as is required by the statute. We have not to determine whether or not a promise to marry was given. That was a question for the jury. The question for us is whether, according to law, the fact of the defendant not answering the letters could be taken as any evidence of the corroboration required by the statute. Another question is whether the possession by the plaintiff of the defendant's signet-ring is such evidence. The first letter put forward by the plaintiff's counsel is one written by the plaintiff to the defendant, in which she states in effect to the defendant that he had promised to marry her. He did not answer it. When one comes to think what is meant by not answering it, it is impossible to see how that could be any evidence in corroboration of the promise to marry. The argument that it was such evidence must be that not answering was an admission by the defendant of the truth of what was alleged against him in the letter. Now the allegation in the present case was that he had promised to marry the plaintiff. Suppose, however, the letter had charged against him some grievous offence or misconduct, and the writer had stated that unless the defendant paid something he would be exposed. The argument, if true at all, must be that by not answering such a letter the man who receives it must be taken to admit that he is guilty of the charges contained in it. Now there are cases—business and mercantile cases—in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer

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it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, "but you promised me that you would do this or that," if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement. But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness. Is it the ordinary habit of mankind, of which the Courts will take notice, to answer such letters; and must it be taken, according to the ordinary practice of mankind, that if a man does not answer he admits the truth of the charge made against him? If it were so, life would be unbearable. A man might day by day write such letters, which, if they were not answered, would be brought forward as evidence of the truth of the charges made in them. The ordinary and wise practice is not to answer them—to take no notice of them. Unless it is made out to be the ordinary practice of mankind to answer, I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them. I have, therefore, no doubt that the mere fact of not answering a letter stating that the person to whom it is written has made a promise of marriage, is no evidence whatever of an admission that he did make the promise, and therefore no evidence in corroboration of the promise. I do not say there may not be circumstances, occurring in a correspondence between a man and woman, which would or might make the omission to answer one letter in the correspondence some evidence of an admission of the truth of the statements contained in that letter. There might be cases in which the Court thought that, having regard to the nature of the correspondence and the circumstances of it, the not answering one letter in that correspondence did amount to evidence of an admission; but this is not one of those cases. Here we have only to say whether the mere fact of not answering the letters, with nothing else for us to consider, is any evidence in corroboration of the promise. If the fact of the defendant not having answered the plaintiff's letter is no evidence in corroboration, it is clear that the not answering the letter of a mere stranger

such as the pastor of the German church, or the letter of the burgomaster, which does not contain any reference to the alleged promise to marry, cannot be evidence in corroboration. Then as to the ring, could any sensible person say, where relations such as those in this case had existed between the parties, that the mere fact of the plaintiff having the defendant's signet-ring in her possession was more consistent with his having promised to marry her, than with the other view of their intimacy? In my opinion it would be contrary to sense to say that the possession of the ring was any evidence corroborating the promise. It matters not whether he gave her the ring, or she took it up from the floor, as he alleges, though the fact that it was a signet-ring makes it less likely that he did give it to her. It was urged that it was a question for the jury whether there was evidence in corroboration of the promise to marry. If that were so, the statute might just as well be discarded altogether. I am of opinion that there was no evidence of the corroboration of the promise to marry required by the statute. The judge, therefore, ought to have non-suited the plaintiff with respect to her claim for damages for breach of promise of marriage, and upon that issue there should be judgment for the defendant.

BOWEN, L.J. It seems to me that, with respect to the question of law for our decision in this case, the matter admits of no doubt. It would be a monstrous thing if the mere fact of not answering a letter which charges a man with some misconduct was held to be evidence of an admission by him that he had been guilty of it. There must be some limitation placed upon the doctrine that silence when a charge is made amounts to evidence of an admission of the truth of the charge. The limitation is, I think, this: Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not. That appears to me good sense, and it is in substance the principle laid down by Willes, J., in *Richards* v. *Gellatly*. (1) He says: "It seems to have been at one time thought that a duty

(1) Law Rep. 7 C. P. 127, at p. 131.

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was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded, and the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected." In this case I think it would be unreasonable and insensible to suppose that the defendant was called upon to answer the statements contained in the plaintiff's letter to him, upon the alternative that they must be taken to be true if he did not deny them. In *Bessela* v. *Stern* (1), a conversation between the plaintiff and defendant was overheard, in which the defendant, on being taxed with having promised to marry the plaintiff, did not deny it. That, it is true, was held to be some corroborating evidence. That, however, was a very different case from this. The Court of Appeal held that, having regard to the circumstances under which the statement was made, the fact that the defendant did not deny it was evidence of an admission that it was correct. The case only illustrates the limitation to be placed upon the doctrine that silence is not evidence of an admission unless it is reasonable to expect that if the statements made were untrue they would be met with an immediate denial. I am of opinion that there was no evidence in corroboration of the alleged promise to marry.

KAY, L.J. The plaintiff's counsel relies upon various matters as evidence which corroborated the plaintiff's testimony that the defendant promised to marry her. I may dispose of some of those matters very shortly. With respect to the ring, it is, to my mind, impossible to treat the possession by the plaintiff of the defendant's signet-ring as corroboration of the promise. A man does not usually give his signet-ring in such cases. It was said that the fact of the defendant not answering certain letters was evidence in corroboration of the promise. The letter written by the burgomaster contains no mention of a promise of marriage, and is clearly not evidence in corroboration. The letter written

(1) 2 C. P. D. 265.

by the pastor of the German church is a letter written by a perfect stranger to the defendant, and it contains a threat to punish him by means of the law or the press for his misconduct. It is clearly a letter which nine out of ten men would refuse to answer, and the refusal to answer it cannot be any corroboration. The real question is, whether the letters written by the plaintiff herself so imperatively required an answer, that the not answering is evidence that the defendant admitted the truth of the statement that he had promised to marry her. I decline to lay down any general rule on this matter. There are certain letters written on business matters, and received by one of the parties to the litigation before the Court, the not answering of which has been taken as very strong evidence that the person receiving the letter admitted the truth of what was stated in it. In some cases that is the only possible conclusion which could be drawn, as where a man states, "I employed you to do this or that business upon such and such terms," and the person who receives the letter does not deny the statement and undertakes the business. The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission. The facts in the present case are that the defendant had had sexual connection with the plaintiff. They had parted, he giving her 100*l.* She goes to an hotel at Cannes, where his mother was living, and she writes to him from that hotel, having seen his mother, and states in effect that he had promised her marriage. Is it an irresistible inference that by declining to answer the letter he must be taken to have admitted the promise? His declining to answer is just as consistent with his not having made the promise as with his having made it. I cannot see that the mere fact of his declining to answer affords the corroborating evidence required by the Act of Parliament. I agree with what has been said by the rest of the Court in this respect, and I think that the proper course which the learned judge at the trial ought to have taken was to say that the plaintiff's evidence with respect to the promise had not been materially corroborated in such a way that there was

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anything left to go to the jury on the issue of breach of promise of marriage.

Motion granted accordingly.

Solicitors for plaintiff: *Hughes & Hughes.*
Solicitors for defendant: *Wakeford, May, & Woulfe.*

W. A.

C. A.
May 13;
July 25.

[IN THE COURT OF APPEAL.]

SKINNERS' COMPANY *v.* KNIGHT.

Landlord and Tenant—Breach of Covenant in a Lease—Ejectment—Compensation—Solicitor's and Surveyor's Charges of Preparing Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), s. 14.

The "compensation" for breach of covenant which a lessee is liable to pay under s. 14 of 44 & 45 Vict. c. 41, does not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by that section.

MOTION to enter judgment for the plaintiffs in an action of ejectment, tried before Charles, J., and a jury.

The following statement of the material facts is taken from the judgment of the Court of Appeal, delivered by Fry, L.J. (post, p. 544):—

By a lease, dated January 2, 1857, the plaintiffs demised certain houses in Middlesex to one Nicholls for a term now unexpired, and the lessee covenanted to maintain and repair the demised premises. The lease contained the usual condition for re-entry for non-observance of any covenant. The defendant Knight is the assign of this leasehold interest. The plaintiffs have brought ejectment against the defendant, alleging (amongst other things) that on June 5, 1889, Knight had made default in his covenant to repair, and that on that day the plaintiffs had served on Knight a notice pursuant to the 14th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), specifying the breaches, and requiring the defendant to remedy the breaches, and to make compensation in money for the breaches, and that the defendant had failed so to do within a reasonable time. At the trial the learned judge left to the jury

two questions. First, he asked them whether the premises were out of repair in May, 1889—a date which we take to have been considered by all parties as equivalent to June 5, 1889, the date of the service of the notice. The jury answered this question in the affirmative. He further asked them whether the houses had been repaired since, prior to January 15, 1890, i.e., between the date of the service of the notice and the date of the issue of the writ. On this question the jury differed, and were in consequence discharged. Upon this Charles, J., has declined to give the plaintiffs judgment, but has left them at liberty to re-enter the action for trial.

Hobson, (*Winch, Q.C.*, with him), for the plaintiffs. In order to bar the landlord's right of re-entry, s. 14 of the Conveyancing and Law of Property Act, 1881, requires two conditions to be fulfilled by the lessee who has been served with the notice prescribed by that section: first, he must remedy the breach—i.e., in the present case put the premises into repair—and, secondly, make compensation in money for the breach. Compensation is to be paid whether the breach can or cannot be remedied. The words "in any case" shew that. But for the statute the landlords, the premises being out of repair at the date of the notice, could have taken proceedings in ejectment at once. The statute restrains the landlord's hand, and places a limit upon his common law right to re-enter; but, as a condition of so limiting his right, it provides that the tenant on his part must do the two specified things. The words "and in any case requiring the lessee to make compensation in money" cannot be read as "or in any case, &c." It is submitted that the word "compensation" includes the solicitor's and surveyor's charges and the costs of serving the notice, which are in question here. It must mean something more than damages for injury to the reversion, and must include the reasonable cost of doing that which the Act has imposed upon the landlord, namely, of preparing and serving the notice.

No counsel appeared for the defendant.

Cur. adv. vult.

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July 25, 1891. The judgment of the Court (Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J.) was delivered by

FRY, L.J., who, after stating the facts as set out ante, p. 542, proceeded:—The plaintiffs appeal to this Court, and insist that, even on the assumption that the premises were put into perfect repair before the issue of the writ, and within a reasonable time after the service of the notice, they are nevertheless entitled to judgment because they say that they were put to expense in consulting a surveyor and solicitor in the preparation of the notice under the Conveyancing Act, and that they are entitled to be repaid this sum as a condition of their not suing for ejectment, and that this sum has not been paid, and this condition has not been performed. The question turns on the 14th section of the Conveyancing Act. That provides that "a right of re-entry under any stipulation in a lease for breach of any covenant shall not be enforceable unless and until the lessor serve on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach." The required notice has been served; the lessee must for the present purpose be taken to have remedied the breach within a reasonable time. Has he failed to make reasonable compensation in money for the breach because he has failed to repay the plaintiffs the expenses to which they have been put in employing the surveyor and solicitor to prepare and serve the notice? The section creates some difficulty, because it seems to contemplate compensation as payment in every case of a breach, and because it uses, not the familiar word "damages" for a breach, but "compensation." But it is evident that many cases may occur in which, where the breach has been perfectly made good and no expense or loss incurred, there may be nothing for which to make compensation, and we are therefore of opinion that, notwithstanding the general terms of the notice required by the statute, the lessee is bound to make compensation, not absolutely in every case, but only

where there is something to compensate. With regard to the word "compensation," we incline to the view that the word "damages" was not used because that is most appropriate to the compensation for a breach when ascertained by the verdict of a jury or the judgment of a Court; but that compensation under the section in question is to be measured by the same rule as damages in an action for the breach. But whether this be so or no, we are clearly of opinion that the expenses in question are not payable as compensation for the breach of the covenant. They arise, not from the breach of the covenant, but solely from the fetter which the wisdom of the legislature has imposed on the enforcement of the cause of action arising from that breach. We therefore think that Charles, J., was right in his conclusion, and that the question whether the breach of the covenant to repair was remedied within a reasonable time must go a jury. The appeal fails.

Motion dismissed.

Solicitor for plaintiffs: *A. C. Rhodes.*
Solicitors for defendant: *M. Webb & Sons.*

W. A.

CONNOR *v.* KENT.
GIBSON *v.* LAWSON.
CURRAN *v.* TRELEAVEN.

April 28, 29; *July* 14.

Criminal Law—Intimidation—Trade Union—Threat of Strike unless Employer ceases to employ Workmen not Members—6 Geo. 4, *c.* 129, *s.* 3—34 *&* 35 *Vict. c.* 32, *s.* 1—*Trade Union Act*, 1871 (34 *&* 35 *Vict. c.* 31), *ss.* 2, 3—*Conspiracy and Protection of Property Act*, 1875 (38 *&* 39 *Vict. c.* 86), *s.* 3, *s.* 7, *sub-s.* 1.

By s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict c. 86), "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—

"(1.) Uses violence to or intimidates such other person or his wife or children or injures his property . . . . shall on conviction thereof be liable, &c."

The appellant and the respondent were workmen in the same yard, members of different trade unions. The trade union to which the respondent belonged having resolved to strike if the appellant did not leave his society and join theirs, the respondent informed the appellant of this without threatening him with violence to person or property in case of his refusal. The appellant

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refused to join the respondent's society, and was dismissed in consequence by his employer in order to avoid a strike. He stated in evidence that "he was afraid, because of what the respondent had said, that he would lose his work, and could not obtain employment anywhere where the respondent's society predominated numerically over his own society":—

Held, that there was no evidence of intimidation by the respondent within the meaning of the section.

The appellant and two other secretaries of trade unions, in order to prevent the respondent employing non-union men, informed him that if he did not cease to do so they would call off from their employment by him all the members of their respective unions. After a meeting of the unions, at which it was resolved that this course should be adopted, the appellant and the other secretaries, in the presence of the respondent, whom they asked to attend, made the following statement to the respondent's workmen and others who were assembled: "Inasmuch as Mr. T." (i.e., the respondent) "still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease to work, and go home." The union men in consequence ceased to work:—

Held, that there was no evidence of intimidation by the appellant within the meaning of the section.

Reg. v. *Druitt* (10 Cox C. C. 592); and *Reg.* v. *Bunn* (12 Cox C. C. 316) dissented from.

CASES of alleged "intimidation" within the meaning of s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), ordered to be argued before a specially constituted Court of five judges.

CONNOR *v.* KENT.

Case stated by the Recorder of Newcastle-on-Tyne on the appeal of Thomas Connor, who had been convicted at the petty sessions of having "wrongfully and without legal authority intimidated" William Preston Kent, within the meaning of s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). The Recorder confirmed the conviction subject to the case, from which it appeared that at the hearing before him the appellant had been examined and cross-examined, and that his decision was to some extent the result of the evidence thus admitted.

Poland, Q.C. (with him, *Forrest Fulton* and *R. J. Neville*), for the respondent. By s. 11 of the Conspiracy and Protection of Property Act, 1875, only persons indicted or informed against under ss. 4, 5, 6 are rendered competent witnesses upon their

own trials. This was an information under s. 7, and the appellant was therefore not a competent witness upon his own trial. The case should be sent back to be restated.

Lawson Walton, Q.C., and *Askew*, for the appellant, were not called upon.

THE COURT (Lord Coleridge, C.J., and Mathew, Cave, A. L. Smith, and Charles, JJ.) held that, as it appeared from the case that the evidence upon which the conviction had been obtained was in part illegal, the conviction must be quashed, and refused to hear the appeal.

GIBSON *v.* LAWSON.

Case stated by justices of Northumberland under s. 33 of the Summary Jurisdiction Act, 1879, on the appeal of Robert William Gibson, against the dismissal by them of a summons charging the respondent, Oswald Lawson, with having "wrongfully and without legal authority intimidated" the appellant, within the meaning of s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86).

It appeared from the case that at the hearing evidence to the following effect was given on behalf of the appellant, and admitted on behalf of the respondent. In December, 1890, they were both employed as fitters in the Howdon yard of Palmer & Co., Limited, a company carrying on business in the county as iron ship-builders, the former being a member of a trade union called the National Society of Engineers, the latter a member and "shop delegate" of a trade union called the Amalgamated Society of Engineers. On December 3 the members of the Amalgamated Society met and passed a resolution not to work at the Howdon yard after Saturday, December 6, unless the appellant joined their union. The respondent, as "shop delegate," stated this to the foreman of the Howdon yard, and he, and afterwards the manager of Palmer & Co.'s two yards—that at Howdon and that at Jarrow—repeated the statement to the appellant. On Friday, the 5th, the appellant saw the respondent and asked that the matter might stand over till Monday, in order that he might consult the union to which he belonged. The respondent refused this, and the appellant then refused to leave the National and join the

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Amalgamated Society. On Saturday, December 6, the foreman of the Howdon yard discharged the appellant in order to prevent a strike. The case stated: "No violence or threats of violence either to person or property were used to the appellant; but he swore that he was afraid because of what the respondent had said that he would lose his work and would not get employment at either the Howdon or the Jarrow yard, or anywhere where the Amalgamated Society predominated numerically over his own society." The justices held that the respondent was not shewn to have intimidated the appellant, and dismissed the summons.

Poland, Q.C. (with him, *Simey*), for the appellant. The respondent should have been convicted. The justices held that he was not shewn to have intimidated within the meaning of the section (1), because he had not used threats of violence to

(1) By 6 Geo. 4, c. 129, ss. 1 & 2, the Act 5 Geo. 4, c. 95, and other Acts, are repealed.

By 34 & 35 Vict. c. 32, passed in 1871, the Act 6 Geo. 4, c. 129, is repealed, and by s. 1, "Every person who shall do any one or more of the following acts, that is to say:—

"(1.) Use violence to any person or any property.

"(2.) Threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace,

"(3.) Molest or obstruct any person in manner defined by this section,

with a view to coerce such person,

"(1.) Being a master, to dismiss, or to cease to employ any workman, or being a workman, to quit any employment or to return work before it is finished;

"(2.) Being a master, not to offer, or being a workman, not to accept, any employment or work;

"(3.) Being a master or workman, to belong or not to belong to any temporary or permanent association or combination;

"(4.) Being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination;

"(5.) Being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him,

shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months.

"A person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases, that is to say:—

"(1.) If he persistently follow such person about from place to place;

"(2.) If he hide any tools, clothes, or other property owned or

the person or the property of the appellant. They were wrong in giving the word this limited meaning. According to the

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used by such persons, or deprive him of or hinder him in the use thereof;

"(3.) If he watch or beset the house, or other place, where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follow such person in a disorderly manner in or through any street or road.

"Nothing in this section shall prevent any person from being liable under any other act, or otherwise, to any other or higher punishment than is provided for any offence by this section, so that no person be punished twice for the same offence:

"Provided that no person shall be liable to any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing as hereinbefore mentioned."

By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 2: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

By the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 3: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

"Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament."

* * * *

By s. 7: Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—

"(1.) Uses violence to or intimidates such other person or his wife or children, or injures his property; or

"(2.) Persistently follows such other person about from place to place; or

"(3.) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or

"(4.) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or

"(5.) Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be

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'Imperial Dictionary' the word signifies "to make fearful; to inspire with fear; to dishearten; to cow; to deter by threats"; and in *O'Connell* v. *Reg.* (1), Tindal, C.J., said of it, "it is not a technical word; not vocabulum artis, but a word in common use." (1) The use, therefore, of any threat calculated to influence a man of ordinary firmness of character, constitutes intimidation. Here the respondent was shewn to have in effect threatened to deprive the appellant of the means of earning a living. This threat might be expected to influence a person of ordinary strength of will.

[CAVE, J. The justices appear to have followed my ruling in *Reg.* v. *McKeevit* (2), which was that to constitute intimidation within the meaning of this section personal violence must be threatened.]

Surely it would be intimidation on the part of a member of a trade union to threaten to destroy a workman's house. The similar expression "menaces" in other statutes has not been construed as limited to threats of personal violence. The offence of "demanding money with menaces," under 7 & 8 Geo. 4, c. 29, and 24 & 25 Vict. c. 96, s. 45, has been held to extend to a threat to charge a clergyman with immorality: see per Lord Ellenborough in *Rex* v. *Southerton* (3), per Tindal, C.J., in *Reg.* v. *Miard* (4), and the decision of the Court of Crown Cases Reserved in *Reg.* v. *Walton* (5).

[CAVE, J. This Act has an altogether different scope from those general statutes. It must be construed with reference to its particular object and the history of the legislation with reference to trade unions.]

Judge v. *Bennett* (6) is a decision on this section in which Stephen and A. L. Smith, JJ., are reported to have held that a threat to "picket" was intimidation.

[MATHEW, J. That case would seem merely to have decided

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imprisoned for a term not exceeding three months, with or without hard labour.

By s. 17, the Act 34 & 35 Vict. c. 32, is repealed.

(1) 11 Cl. & F. 155, at p. 235.

(2) Liverpool Assizes, December 16, 1890, unreported.

(3) 6 East, 126.

(4) 1 Cox C. C. 22.

(5) Leigh & Cave C. C. 288.

(6) 52 Justice of the Peace, 247.

that a threat to do something specifically prohibited by the statute, if it in fact intimidates, is intimidation.]

The Act of 1875 repeals the Act of 1871 (34 & 35 Vict. c. 32), s. 1, sub-s. 2 of which makes it an offence to "threaten or intimidate any person in such a manner as would justify a magistrate in binding over the person so threatening or intimidating to keep the peace." It must be admitted that the respondent could not have been found guilty under this section, as he could not have been bound over to keep the peace for any except threats of personal violence. But it is contended that as this limitation is repealed by the Act of 1875 with the rest of the Act of 1871 (34 & 35 Vict. c. 32), "intimidation" in the Act of 1875 must be interpreted according to the decisions upon s. 3 of the earlier Act (6 Geo. 4, c. 129), which made it an offence "by violence to persons or property or by threats or intimidation, &c., to endeavour to force a man to depart from his hiring." If so, *Walsby* v. *Anley* (1), *O'Neill* v. *Longman* (2), and *Wood* v. *Brown* (3), shew that the respondent could have been indicted under that Act for illegally combining with other workmen to coerce the appellant by threats, though he did not use or threaten violence.

[MATHEW, J. On the ground that the combination amounted to a conspiracy in restraint of trade.

CAVE, J. The Act of 1875 was not intended to increase the stringency of the law. It was preceded by a Royal Commission which recommended a relaxation of the law in favour of trade unions.]

The respondent acted "wrongfully" within the meaning of the section. It is true that trade unions have been declared to be legal associations; but it is still illegal for a member of one to combine with other members to coerce a man into joining the union by threatening to prevent his obtaining employment if he does not do so: *Mogul Steamship* v. *McGregor* (4); *Hilton* v. *Eckersley* (5); *Hornby* v. *Close* (6); *Farrer* v. *Close* (7); *Rigby* v. *Connol* (8); *Mineral Water Bottle Exchange and Trade Society*

(1) 30 L. J. (M.C.) 121.
(2) 4 B. & S. 376.
(3) 36 L. J. (M.C.) 5.
(4) 23 Q. B. D. 598.
(5) 6 E. & B. 47.
(6) Law Rep. 2 Q. B. 153.
(7) Law Rep. 4 Q. B. 602.
(8) 42 L. T. (N.S.) 139.

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v. *Booth*. (1) For so doing the respondent is still liable to be indicted for conspiracy in accordance with the rulings of Bramwell, B., in *Reg.* v. *Druitt* (2) and Brett, J., in *Reg.* v. *Bunn*. (3)

J. Lawson Walton, Q.C. (*Hedderwick*, with him), for the respondent. The respondent was not guilty of "wrongfully intimidating" the appellant within the meaning of s. 7. To tell a workman that a body of workmen have agreed in a certain event to refuse to work with him is now neither "wrongful" nor "intimidation." The sub-sections are expressed with extreme precision, and it is plain that the words "intimidate such other person or his wife or children" in sub-s. 1, placed as they are between "uses violence to" and "injures his property," refer to threats of physical injury alone. If it had been intended, in so careful a series of definitions, to make notice of a combination to refuse to work with a particular workman statutory intimidation, there would have been a specific enactment to this effect.

The sole ground of the decisions in *Walsby* v. *Anley* (4) and other cases on the words "threats or intimidation" in s. 3 of 6 Geo. 4, c. 129, was that trade unions were then illegal associations as being in restraint of trade. This disability was removed by the Trade Union Act, 1871 (34 & 35 Vict. c. 31), ss. 1 and 2. In the same year the Act 34 & 35 Vict. c. 32, was passed, and by s. 1 "threatening or intimidating" was limited to cases in which violence was used such as would render the aggressor liable to be bound over to keep the peace, while acts done in restraint of trade were declared to be no longer criminally punishable. Between 1871 and 1875, therefore, the respondent could not have been convicted. Having regard to the course of events in the interval, it is most unreasonable to suppose that the Act of 1875 was intended to extend the meaning of "intimidation."

In *Judge* v. *Bennett* (5) it would seem that there was a threat to break the law by the use of illegal and coercive picketing. [He referred to Wright on Criminal Conspiracies and Agreements, pp. 50–59.]

(1) 36 Ch. D. 465.
(2) 10 Cox C. C. 592.
(3) 12 Cox C. C. 316.
(4) 30 L. J. (M.C.) 121.
(5) 52 Justice of the Peace, 247.

CURRAN *v.* TRELEAVEN.

Case stated by the Recorder of Plymouth upon the appeal of Pete Curran, who had been convicted at the petty sessions of "wrongfully and without legal authority intimidating" George Frederick Treleaven within the meaning of s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). Appeals by George Shepheard and John William Matthews, who had been convicted at the petty sessions of the same offence, were heard at the same time. The magistrates sentenced each defendant to a fine of 20*l.*, or in default to six weeks' imprisonment with hard labour. The case stated as follows:—

The prosecutor, Mr. Treleaven, is a coal merchant carrying on business at Plymouth, and in the course of his business has to provide for the unloading of ships chartered by him.

At the time of the acts out of which these proceedings arose, he was unloading four ships, each with a gang of four men. Three of these gangs consisted of men who were members of one or other of the trade unions hereinafter mentioned. The other consisted of men who were not connected with any union, and they were unloading a ship called the *Ocean Queen.*

The gangs of men were in each case engaged upon the terms that they should complete the unloading of the ships at a given price per ton of coal unloaded.

The defendant was the secretary of the National Union of Gas Workers and General Labourers of Great Britain; George Shepheard was the secretary of the Dock Wharf Riverside and General Labourers Union of Great Britain and Ireland; and John William Matthews was the secretary of the Bristol West of England and South Wales Operative Trade and Provident Society. Each of these trade unions was duly registered under the Trades Unions Act of 1871, and they were the three trade unions which had branches in the borough of Plymouth.

On October 9, 1890, the defendant, with the said Shepheard and Matthews, called upon the prosecutor, who, being aware of their intention to come, had arranged for the presence of reporters, and asked him not to employ non-union men, and told him, inter

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alia, that if he continued to do so the unions would combine to prevent his business going on. No conclusion was arrived at that day, but it was arranged that in the meantime the gang of non-union men should complete the unloading of the *Ocean Queen*, and that the prosecutor should only employ union men on his other ships.

On October 14 the unloading of the *Ocean Queen* was completed, and the defendant, and Shepheard and Matthews, again met the prosecutor at his office in the presence of reporters. The prosecutor stated that he had decided not to bind himself to employ only union men, though he had no hostility to the unions; that he should treat all men alike, whether union men or not. He also stated that he had been advised that the defendant had committed an offence by the threats he had used on the 9th, but in the interests of peace he should take no proceedings if no further steps were taken by the defendant.

The defendant repeated his statement that the union would combine to prevent the prosecutor's business going on unless he consented to employ only union men. The defendant further said that the funds of the union were in good condition, and would be used to prevent him employing non-union men.

The prosecutor on the 14th engaged the four non-union men to unload a ship called the *Canada*, and they commenced to unload her on the morning of the 15th.

On October 15, the defendant, and Shepheard and Matthews, came to the wharf at which two of the prosecutor's ships were unloading, and, having asked him to be present, said in his hearing and that of his workmen and others who were assembled on the wharf: "Inasmuch as Mr. Treleaven still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease to work and go home."

The orders thus given were obeyed, and the union men who were unloading Mr. Treleaven's ships immediately ceased unloadingly them, although they had not completed the work that they were under contract to perform.

The words and acts above described made the prosecutor afraid that he would suffer serious injury to his business and conse-

quently loss to himself, through his union workmen still refusing at the request of the defendant to perform their contracts, and through the defendant, and Shepheard and Matthews and the unions they represented, combining to prevent his obtaining workmen for the future, and so to prevent his business going on. The prosecutor had reasonble grounds for such fear, such as would have influenced any man of ordinary sound judgment and nerves. Such fear prevented his being able to decide freely whether he should or should not employ men who were not members of the union.

The defendant used the words and did the acts aforesaid with the intention of producing this fear in the prosecutor's mind, and for this purpose invited him to listen to what he said. His object in producing this fear was to compel the prosecutor to discharge the non-union men who were working for him, and to prevent his deciding freely whether he should or should not employ men who were not members of the union.

The direct object of the defendant in calling out the men was to injure the business of Mr. Treleaven; the indirect object was that stated below. It was not because of anything in the terms or conditions of the employment of the men to which the defendant or the men themselves objected that the defendant so called out the men. The employment of union men was not in any way affected by the employment of a gang of non-union men to unload a different ship from that on which they were working.

The union men in leaving their employment at the request of the defendant were, as the defendant knew, breaking their contract.

The defendant did not desire or intend that any personal violence should be used to Mr. Treleaven or his family, or that any injury should be done to his property otherwise than by the injury to his trade above described; but the prosecutor was reasonably afraid that violence might be used to his workmen and injury inflicted on his property by other persons wishing to aid the unions in carrying out the intention to prevent his business going on as an indirect result of the defendant's acts and words, though against his wishes and intentions.

The defendant had no ill-will to Mr. Treleaven personally, but

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spoke and acted as he did with the object of obliging all labourers to join the union by making it impossible for them otherwise to obtain employment, and thus obtaining for the unions a monopoly of the labour of the town.

The Recorder confirmed the convictions. In his judgment he held that though an agreement by the defendants to strike for their own benefit might be lawful, an agreement by them to strike for the express purpose of injuring the business of the prosecutor was unlawful, as appeared from *The Mogul Steamship Co.* v. *McGregor.* (1)

Sir H. James, Q.C. (with him, *Besley*), for the appellant. If the circumstances under which this section became law could be stated, it would appear that it was framed with the express view of rendering such a conviction as this impossible. (2) By "intimidation" only threats of personal violence are intended. The legislature did not and could not mean, while enacting that it was legal to strike, to enact at the same time that it was criminal for workmen to give their employers notice of their intention to strike.

Poland, Q.C. (with him, *Duke*), for the respondent in *Curran* v. *Treleaven,* and in reply for the appellant in *Gibson* v. *Lawson.*

Cur. adv. vult.

July 14. The judgment of the Court (Lord Coleridge, C.J., Mathew, Cave, A. L. Smith, and Charles, JJ.) was read by

LORD COLERIDGE, C.J.:—

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In this case we are all of opinion that the conviction cannot be sustained, but upon a ground peculiar to this case only; and our judgment upon it can throw no light upon the general and more important questions raised in the other cases, which were

(1) 23 Q. B. D. 598.

(2) See Hansard's Parliamentary Debates, 3rd series, vol. 226, pp. 32–39 (speech of Lord Cairns on the second reading of the bill in the House of Lords on July 26, 1875, expressing approval of the ruling of Mr. Russell Gurney, then Recorder of London, in the "*Cabinet-makers' Case*"); pp. 163–169 (clause moved in Committee by Lord Cairns, and passed); pp. 709–717 (debate in the House of Commons on the Lords' amendments; speeches of Sir Richard Cross and Mr. Lowe).

argued at the same time with this. The Recorder of Newcastle-upon-Tyne, who heard the case, allowed the appellant to be examined and cross-examined, and in the case which he has stated for the Court he has informed us that the appellant's evidence formed part of the grounds upon which he founded his judgment. This was pointed out to us very properly by Mr. Poland when he came to argue the case before us. We think it is decisive. No statute allows, and certainly the common law forbids, a prisoner to give evidence on such a charge as the one in this case; and it follows that, as the conviction was obtained partly by means of illegal evidence, it cannot be sustained, and must be quashed. It is due to the learned Recorder to state that we have been informed, and we do not doubt correctly, that he was misled by the agreement of the counsel before him that the evidence had been made receivable by statute. So much alteration in this direction has lately taken place in the law, that the belief and acquiescence of the Recorder are not to be wondered at. In fact, however, the law has not yet been altered; the Recorder was very naturally misled; but the consequence of his mistake is necessarily that to which we have already given expression.

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The next case to be considered is that of *Gibson* v. *Lawson*, in which the circumstances are peculiar, and in which, the magistrates having dismissed the charge, the appeal is against the dismissal of the summons—a course, no doubt, open to the appellant under 42 & 43 Vict. c. 49, s. 33 (Summary Jurisdiction Act, 1879). This summons was under 38 & 39 Vict. c. 86, s. 7, and charged in substance that the respondent unlawfully intimidated the appellant.

The respondent was employed as a fitter in the yard of an iron shipbuilding company; the appellant was employed in the same capacity in the same yard. The respondent was a member of a society called the Amalgamated Society; the appellant was a member of a society called the National Society. On December 3, 1890, a meeting of the Amalgamated Society was held, at which it was resolved that the members of that society would

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strike unless the appellant left his society and joined theirs. The respondent communicated this resolution to the foreman of the shipbuilding company, who communicated it to the appellant. Thereupon the appellant had an interview with the respondent. In the result the respondent informed the appellant that the Amalgamated Society were determined to carry their resolution into effect, but gave him till the morning of Saturday, December 6, to make up his mind. The appellant adhered to his own society, and the shipbuilding company, in order to avoid a strike, dismissed him from their yard. It is expressly found in the case that no violence or threats of violence to person or property were used to the appellant; but he swore that he "was afraid, because of what the respondent had said, that he would lose his work, and would not get employment anywhere where the Amalgamated Society predominated numerically over his own society." These are the whole of the material facts, and on these facts the magistrates dismissed the summons, and, we think, rightly.

The summons was issued, as has been already stated, under 38 & 39 Vict. c. 86, s. 7. The 3rd section of that Act distinctly legalises strikes in the broadest terms, subject to the exceptions enumerated in the 4th and 5th sections which immediately follow, and are almost in the nature of provisoes upon the 3rd. The 6th section is on a subject altogether alien from the present question; and then comes the 7th, upon which we have to decide. It is true that the Act before us is one of a series of Acts dealing with subjects the same as or cognate to those dealt with in the Act itself. Many of these are expressly repealed by the 17th section, and amongst them 34 & 35 Vict. c. 32, is wholly repealed. The Act 34 & 35 Vict. c. 32, was passed in 1871, after, therefore, the charge to the jury by the present Lord Bramwell in *Reg.* v. *Druitt* (1), which was in 1867. Whether the Act was produced by the charge it is profitless to inquire. The last proviso of the 1st section is plainly inconsistent with the charge, and still more inconsistent with the language of Crompton and Hill, JJ., who, in *Hilton* v. *Eckersley* (2) and *Walsby* v. *Anley* (3),

(1) 10 Cox C. C. 592. (2) 6 E. & B. 47; 24 L. J. (Q.B.) 353. (3) 30 L. J. (M.C.) 121.

had the one declared and the other suggested that strikes were *per se* criminal at common law; and still further with the somewhat rhetorical language of Sir William Erle, who describes a strike as "the power of evil, in remorseless activity, destroying those relations between employers and employed on which comfort and peace depend, bringing guilt and misery on the workmen and ruin on their employers" (Erle on Trade Unions, p. 85). The statute 34 & 35 Vict. c. 32, is not, indeed, conceived in any weak spirit of tenderness to workmen, but the 2nd sub-section of the 1st section limits "intimidation" in that sub-section to such intimidation as would justify a magistrate in binding over the intimidator to keep the peace towards the person intimidated—in other words, to such intimidation as implies a threat of personal violence. Of such intimidation there is in this case no evidence whatever; but it is truly said that this statute is repealed, and is of importance only so far as its objects and language may throw light upon the existing statute—the statute under which the summons was issued. It seems clear, however, that, looking at the course of legislation, and keeping in mind the changing temper of the times on this subject, the word "intimidate" in the 7th section of the later Act cannot reasonably be construed in a wider and severer sense than the same word in the 2nd sub-section of the 1st section of the earlier Act. "Intimidate" is not, as has been often said by judges of authority, a term of art—it is a word of common speech and everyday use; and it must receive, therefore, a reasonable and sensible interpretation according to the circumstances of the cases as they arise from time to time. We do not propose to attempt an exhaustive definition of the word, nor a complete enumeration of the cases to which it may be properly, nor of those to which it may be improperly, applied. It is enough for us to say that in this case it appears to us all that there was nothing which, under any reasonable construction of the word "intimidate," could be brought within it. Whether the action of the Amalgamated Society was morally right or not is a matter on which we express no opinion, because it is not the question before us. It seems to us that it was not illegal within the words of the Act of Parliament under which the summons was issued.

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This, however, does not entirely dispose of the question; for we were very properly reminded of the cases of *Reg.* v. *Druitt* (1) and *Reg.* v. *Bunn* (2), in which Lord Bramwell and Lord Esher (then Bramwell, B., and Brett, J.), are both said to have held that the statutes on the subject have in no way interfered with or altered the common law, and that strikes and combinations expressly legalised by statute may yet be treated as indictable conspiracies at common law, and may be punished by imprisonment with hard labour. Neither of those cases is very satisfactorily reported; in neither was there any motive for questioning the dicta of the judges; in the one tried by Lord Esher (then Brett, J.), there was no opportunity, in consequence of the prisoner having been acquitted on all the counts to which the alleged ruling applied. We are well aware of the great authority of the judges by whom the above cases were decided, but we are unable to concur in these dicta, and, speaking with all deference, we think they are not law. It seems to us that to hold that the very same acts which are expressly legalised by statute remain nevertheless crimes punishable by the common law is contrary to good sense and elementary principle, and that the reports, therefore, cannot be correct. If the dicta are law, they render the statutes passed on these subjects practically inoperative; these statutes might as well not have been passed. The dicta are criticized in detail and with great ability in Mr. Justice Wright's excellent work on the Law of Criminal Conspiracies and Agreements, pp. 50–59. It is difficult to withhold assent from the statements and reasonings contained in those pages, and it seems to us that the law concerning combinations in reference to trade disputes is contained in 38 & 39 Vict. c. 86, and in the statutes referred to in it, and that acts which are not indictable under that statute are not now, if, indeed, they ever were, indictable at common law.

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There remains to be considered only the case of *Curran* v. *Treleaven*, in which the Recorder of Plymouth affirmed a conviction by magistrates, who had convicted the secretaries of three trade unions in Plymouth for having intimidated Mr. Treleaven,

(1) 10 Cox C. C. 592. (2) 12 Cox C. C. 316.

a shipowner in that town, within the meaning of 38 & 39 Vict. c. 86, s. 7, sub-s. 1. The circumstances were very much like those in the last case on which we have just decided. In order to prevent the employment by Mr. Treleaven of non-union men, the three secretaries told him that if he did not cease to employ non-union men they, the secretaries, would call off from their employment by him all the members of their respective unions. Mr. Treleaven refused compliance with their demands, and thereupon the secretaries called off their respective union men, who, in obedience to the call, struck work. The facts are stated to us as follows by the learned Recorder in the case which he has submitted to us: "On October 14, there was a meeting of the unions, at which it was resolved to adopt the course which the defendants had stated at their interview would be adopted, and, accordingly, on the 15th, the defendants, in the presence of Mr. Treleaven, whom they had asked to attend, made the following statement to Mr. Treleaven's workmen and others who were assembled at the wharf: 'Inasmuch as Mr. Treleaven still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease to work and go home.' The orders thus given were obeyed, and the union men who were unloading Mr. Treleaven's ships immediately ceased unloading them, although they had not completed the work that they were under contract to perform." He has also found, amongst other facts, or rather he has expressed his opinion upon the two following facts or points in these words, amongst other points not necessary to be considered, with reference to the particular question of intimidation: "That the defendants did not desire or intend that any violence should be used or injury done to Mr. Treleaven or his property; that it was not proved that their words or acts were calculated directly to cause any such violence or injury, although I am of opinion that Mr. Treleaven was not unreasonably afraid that such violence or injury might occur from the action of the members of the unions in consequence of the strike, but against the wishes and intentions of the defendants; that the defendants had no ill-will against Mr. Treleaven personally, but acted with the object of obliging all the labourers to

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join the union as a means of getting employment and of obtaining for the members of the unions a monopoly of the labour of the port." He held, as the result of a very careful and able examination of the statutes and authorities, that the facts above stated constituted intimidation within the words of the section, and that the appellants were properly convicted by the magistrates of intimidating. We are unable to agree with him. As we said in an earlier part of the judgment, we do not propose to enter upon an exhaustive enumeration of all the possible acts which do, and of those which do not, constitute intimidation within the section. But we say that, to tell an employer that if he employs workmen of a certain sort, the workmen of another sort in his employ will be told to leave him, and to tell the men, when the employer will not give way, to "leave their work, use no violence, use no immoderate language, but quietly cease to work and go home" (we quote the language of the Recorder), is certainly not intimidation within any reasonable construction of the statute.

Two further observations are necessary in order to make our judgment complete and effective. We do not think that the legislature intended, by the change of words in the 1st sub-section of the 7th section of 38 & 39 Vict. c. 86, to send the Courts back to 6 Geo. 4, c. 129, for an interpretation of the word "intimidate," although the later statute did repeal 34 & 35 Vict. c. 32, which limited intimidation to cases which would justify a magistrate in binding over the party to keep the peace. There is, indeed, much to be said for the view entertained by my learned brother Cave, and acted upon by him (as mentioned by the Recorder in his judgment) in a case tried before him at Liverpool (1)—namely, that intimidation in 38 & 39 Vict. c. 86, must still be limited to threats of personal violence, as enacted by 34 & 35 Vict. c. 32. It may become necessary to decide this point in time to come; it is not now; and we confine ourselves to the negative statement that 6 Geo. 4, c. 129, is not now on this subject the governing statute.

The other point is this. The Recorder held that, though an agreement to strike to benefit themselves would be now a lawful

(1) *Reg.* v. *McKeevit*, Liverpool Assizes, December 16, 1890, unreported.

agreement, a strike which *would have the effect* of injuring an employer is illegal and indictable at common law. He cites in support of his view some phrases from the judgments of the Lords Justices in the case of the *Mogul Steamship Co.* v. *McGregor and Others.* (1) But, with deference, he has somewhat misapprehended the point of these observations. It is true that where the object is injury, if the injury is effected, an action will lie for the malicious conspiracy which has effected it; and, therefore, it may be that such a conspiracy, if it could be proved in fact, would be indictable. But it was pointed out in some detail by the Court of first instance, that where the object is to benefit oneself, it can seldom, perhaps it can never, be effected without some consequent loss or injury to someone else. In trade, in commerce, even in a profession, what is one man's gain is another's loss; and where the object is not malicious, the mere fact that the effect is injurious does not make the agreement either illegal or actionable, and, therefore, it is not indictable. The Recorder finds that there were was no malice in fact, and this finding is inconsistent with the conclusion that the agreement was either criminal or unlawful. For these reasons, we are of opinion that the judgment of the Recorder cannot be sustained, that it must accordingly be reversed, and the conviction quashed.

Convictions quashed in Connor *v.* Kent *and* Curran *v.* Treleaven.

Judgment for the respondent in Gibson *v.* Lawson.

Solicitors for appellant in *Connor* v. *Kent: F. A. K. Doyle, for Dix & Warlow, Newcastle-upon-Tyne.*

Solicitors for respondent in *Connor* v. *Kent: Botterell & Roche.*

Solicitors for appellant in *Gibson* v. *Lawson: Maples, Teesdale & Co., for Lambert, Gateshead.*

Solicitors for respondent in *Gibson* v. *Lawson: F. A. K. Doyle, for Dix & Warlow, Newcastle-upon-Tyne.*

Solicitors for appellant in *Curran* v. *Treleaven: Shaen, Roscoe, Massey & Co.*

Solicitors for respondent in *Curran* v. *Treleaven: Law & Worssam, for Bond & Pearce, Plymouth.*

H. D. W.

(1) 23 Q. B. D. 598.

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April 7, 15;
July 4, 6.

[IN THE COURT OF APPEAL.]

TAWS *v.* KNOWLES.

Easement—Right of Way—Servient and Dominant Tenement—Owner of both Tenements—Mortgage of Servient Tenement without reservation of Right—Implied Reservation—Will—Devise—Implied Grant.

A testatrix was the owner of two adjoining houses, A and B, which were situate back to back. There was a passage leading from house A (which the testatrix occupied) through house B (which she let) to a street; and she used this passage, which was not a way of necessity, from time to time but not continuously, as a way to the street. In 1882 she mortgaged house B without reserving any right of way through this passage; and she died in 1886, having by her will, dated in the same year, devised house A to the plaintiff's predecessor in title, and house B to the defendant; the will contained no words descriptive of or appropriate to any right of way through the passage. At the death of the testatrix the mortgage was still subsisting; but after her death the defendant paid off the mortgage on house B, and took a reconveyance of the property comprised in the mortgage. The plaintiff having brought an action to recover damages from the defendant for trespass in stopping up the passage and preventing its user by the plaintiff:—

Held, by A. L. Smith and Grantham, JJ., first, that as no right of way was reserved by the mortgage, and the way through the passage was not a way of necessity, all right of way through the passage was extinguished by the mortgage; and secondly, that no right of way through the passage passed to the plaintiff's predecessor in title under the will, and accordingly that on both these grounds the action was not maintainable.

Upon appeal, the Court (Lindley, Fry, and Lopes, L.JJ.), without deciding whether or not any right of way passed under the will to the plaintiff's predecessor, *held*, that, as the plaintiff and defendant were both volunteers, the plaintiff had no equity to deprive the defendant of the larger estate which she had obtained by virtue of the reconveyance, and that the appeal must be dismissed, subject to the right (if any) of the plaintiff to redeem the mortgage.

APPEAL from a decision of A. L. Smith and Grantham, JJ., reversing a judgment of the county court judge of Newcastle-upon-Tyne, in favour of the plaintiff in an action of trespass.

From the evidence and admissions of the parties it appeared that in 1855, Mary Ellison acquired the fee simple of a plot of land in North Shields, fronting on a street called Church Way, and extending back to Bedford Street; there was a house on the land fronting Church Way, the remainder of the plot being then garden ground. In the same year she married John Bell, reserving by her antenuptial settlement a power of appointment

by deed or will over this property; Mrs. Bell thenceforth occupied the house in Church Way until her death. On the land fronting Bedford Street she built a house and shop, which stood back to back with the Church Way house; each house had a yard, with a wall dividing the two; and along the side of and upon the Bedford Street premises there was a paved and walled passage from the Church Way premises into Bedford Street, having one door at the Bedford Street end, and another door in the wall separating the two yards. This passage was used from time to time, though not continuously, by Mrs. Bell, chiefly for the removal of ashes; it was admittedly not a way of necessity. The house and premises in Bedford Street were let by Mrs. Bell to a tenant.

On May 30, 1882, Mrs. Bell mortgaged the Bedford Street house and premises to Margaret Davison; the description of the premises by metes and bounds in the mortgage admittedly included the site of the passage, and the mortgage contained no reservation of a right of way over the Bedford Street premises in favour of the Church Way property. On August 28, 1886, Mrs. Bell died, having, in exercise of the power reserved in her antenuptial settlement, made a will, dated January 7, 1886, by which she devised the Church Way premises to her husband John Bell, for his natural life, with remainder to her nephew Robert Johnson, and the Bedford Street premises to the defendant for her sole and separate use. The will contained no words descriptive of or appropriate to any right of way. In March, 1887, John Bell died, and in the same year Robert Johnson sold the Church Way premises to the plaintiff, a right of way through the Bedford Street property being expressly granted to the plaintiff by the conveyance. The mortgage on the Bedford Street property was paid off by the defendant in 1887, and by indenture of April 25, 1887, Margaret Davison, the mortgagee, reconveyed to the defendant, Mrs. Knowles, for her sole and separate use, "all that piece or parcel of ground, messuage and hereditaments comprised in, or which have by any means become subject to, the hereinbefore-recited indenture."

The defendant having removed the door at the end of the passage with the intention of building across the passage in

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continuation of the dividing wall, and so cutting off all communication between the two properties, the plaintiff brought an action for trespass in the county court, and the defendant counter-claimed for an injunction restraining the plaintiff from trespassing upon the passage. The learned county court judge gave judgment for the plaintiff, and the defendant appealed to the Queen's Bench Division.

William Baker, for the defendant. The effect of the mortgage of the Bedford Street premises without the reservation of any right of way over them to the mortgagor was to extinguish the right of way. In this respect there is no difference between a mortgage, which passes the legal estate subject to the equity of redemption, and an absolute conveyance, and it is clear law that where there is an absolute conveyance of land the grantor cannot derogate from his own absolute grant so as to claim rights over the thing granted, even if the rights claimed were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of the grantor: *Suffield* v. *Brown* (1); *Wheeldon* v. *Burrows*. (2) It is true that there is an exception to this rule in the case of ways of necessity; but this is not a way of necessity. The defendant takes under the mortgage, which she paid off, and not under the will.

Secondly, apart from the question of the effect of the mortgage, the will did not pass to the plaintiff any right to the use of this passage. The effect of the decisions in *Pearson* v. *Spencer* (3) and *Polden* v. *Bastard* (4), is that upon a severance of tenements, whether by will or otherwise, easements used as ways of necessity or in their nature continuous will pass by implication of law without any words of grant, but that easements used from time to time only will not pass in the absence of appropriate language shewing an intention that they should pass. In the present case the passage is admittedly not a way of necessity, neither was the right of way over it a continuous easement.

[He also cited *Brett* v. *Clowser*. (5)]

(1) 4 D. J. & S. 185.
(2) 12 Ch. D. 31.
(3) 1 B. & S. 571; 3 B. & S. 761.
(4) Law Rep. 1 Q. B. 156.
(5) 5 C. P. D. 376.

Warrington, for the plaintiff. The argument for the defendant draws no distinction between the effect of an absolute conveyance and that of a mortgage. After the mortgage there was an equity of redemption in Mrs. Bell; and an equity of redemption is not a mere right to redeem: it is an estate in the land, subject to the mortgagee's power to enforce his security: *Casborne* v. *Scarfe*. (1) It is true that neither the mortgagee on foreclosure, nor a purchaser under a power of sale in the mortgage, could be affected by the plantiff's right of way. But the defendant does not stand in the shoes of the mortgagee; she takes as a volunteer under the will.

Secondly, the will, apart from the mortgage, passes the right to use this passage. It is inconceivable that the passage was not made for the benefit of the Church Way house, and if not strictly a way of necessity it is of the very greatest convenience. The exception to the doctrine that on a severance of tenements easements will not pass by implication of law without words of grant is not confined to ways of necessity strictly so called: *Brown* v. *Alabaster* (2); *Pearson* v. *Spencer* (3); it includes also ways of quasi necessity, and the devise of the Church Way premises therefore carries the right to use this passage.

W. Baker, in reply.

Cur. adv. vult.

April 15. The following written judgment of the Court (A. L. Smith and Grantham, JJ.) was read by

A. L. SMITH, J. This is an appeal from the county court judge of Newcastle-upon-Tyne, who found for the plaintiff. The plaintiff sued the defendant for trespass for removing a door, the point raised being whether the plaintiff was entitled to a right of way through the premises of the defendant; the defendant counterclaimed for an injunction restraining the plaintiff from trespassing upon the way. The houses of the plaintiff and defendant stand back to back, the plaintiff's house facing on to Church Way, and the defendant's house on to Bedford Street. The plaintiff asserts that he has a right of way over and along the side of the

(1) 1 Atk. 603 (2) 37 Ch. D 490.
(3) 1 B. & S. 571, 3 B. & S 761

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defendant's premises so as to enable him to pass from his Church Way premises into Bedford Street, and this the defendant denies.

The plaintiff and defendant both claim title to their respective properties under the will of the late Mrs. Bell, who died in August, 1886, having made her will in the preceding January. In the year 1855 Mrs. Bell became possessed of the land upon which the plaintiff's and defendant's houses now stand. The Church Way house was first built, and was occupied by Mrs. Bell. In the year 1866 she built the Bedford Street house upon the vacant plot in rear of her Church Way house according to a plan which unquestionably left a passage, walled and paved, across the Bedford Street house premises, so that she or other the occupier of the Church Way house might pass and repass from and to its rear to and from Bedford Street. There was a door placed at each end of this passage. It appears from the evidence that this passage had been intermittently used by the occupiers of the Church Way house, principally in order to get rid of the ashes without taking them through that house.

On May 30, 1882, Mrs. Bell conveyed the Bedford Street premises to Miss Davidson, the predecessor in title to the defendant, subject to Mrs. Bell's equity of redemption. By this conveyance she conveyed the whole of the Bedford Street premises, including the passage in question, and reserved no right of way whatever over it from the Church Way house to Bedford Street. The first question is, as to what is the effect of that conveyance upon the passage in question.

It is, we think, clear that if this had been a conveyance in fee to the predecessor in title of the defendant, the defendant would have taken the Bedford Street premises, including the passage, freed from any right of way over them which theretofore had existed in favour of the grantor. The case would have fallen directly within the second proposition laid down by the Court of Appeal in the case of *Wheeldon* v. *Burrows* (1), which is as follows: "The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. This rule is subject to certain exceptions, one of which is the well-known exception which

(1) 12 Ch. D. 49.

attaches to cases of what are called ways of necessity." In the present case the passage was not a way of necessity, nor does it fall within any of the exceptions mentioned in the case.

After the conveyance in 1882, as before stated, Mrs. Bell made her will in January, 1886, by which she devised the Church Way premises to her husband for his natural life, and after his decease to her nephew, Robert Johnson, the predecessor in title of the plaintiff; the Bedford Street premises she devised to her domestic servant, Mary Neil, now Mary Knowles, the defendant. At the date of her will and of her death the Bedford Street premises remained so conveyed to Miss Davidson. It is said that inasmuch as the premises were thereby conveyed by way of mortgage, the rule above stated did not apply. We had considerable difficulty in following this argument, or the principle upon which it was founded; but it seems to us that the rights of the plaintiff and defendant must be ascertained as of the date of the death of Mrs. Bell: each party then took what her will gave them, no more and no less, and their respective estates do not depend upon what may subsequently have taken place. At this date Mrs. Bell, the testatrix, had conveyed by way of mortgage to the defendant's predecessor in title the Bedford Street premises without any reservation of any right of way from the Church Way premises. At that date the sole interest Mrs. Bell had was an equity of redemption. It seems to us that whether the mortgage was subsequently paid off or foreclosed cannot determine what it was that the defendant's predecessor took under the will. In our judgment this case is to be decided upon the same principles as if the conveyance had been in fee; and, on this ground, the defendant is entitled to succeed.

It was further argued for the defendant that, even if this were not so, the will did not give to the plaintiff's predecessor in title any right of way over the defendant's close, and that he had no cause of action. The law applicable to this point is stated by Erle, C.J., in delivering the judgment of the Exchequer Chamber in *Polden* v. *Bastard* (1). "There is a distinction," he says, "between easements such as a right of way or easements used from time to time, and easements of necessity or continuous

(1) Law Rep. 1 Q. B. 161.

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easements. The cases recognise this distinction, and it is clear law that upon a severance of tenements easements used as of necessity or in their nature continuous will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shews an intention that they should pass." The right of way now claimed by the plaintiff is an easement used from time to time only, and is not a continuous easement; and inasmuch as there are no appropriate words in the will, and, indeed, no words at all, shewing an intention that it should pass, in our judgment, upon this point also, the defendant's contention is correct.

The Conveyancing Act, in our opinion, does not apply. The appeal must be allowed, and judgment entered for the defendant, who is entitled to an injunction as asked, and must have the costs here and below.

Appeal allowed.

W. J. B.

The plaintiff appealed.

July 4, 6. *Warrington*, for the plaintiff. The plaintiff and defendant are both volunteers, and can only take what the testatrix could give them; and the testatrix, as mortgagor, could not set up her mortgage as against persons claiming under her. At the time of the death of the testatrix the legal estate in the Bedford Street premises was outstanding in the mortgagee; but in equity the mortgagor had an estate, and not a mere right to redeem, and remained entitled to the property, subject only to the mortgage. The mortgage debt has since been paid off by the defendant; the mortgage is gone, and as between the plaintiff and the defendant, the position of the property and the rights of the plaintiff must be regarded as if the mortgage had never existed. This being so, the plaintiff is the devisee of the quasi dominant tenement, and is entitled to a right of way through this passage, as a continuous and apparent easement over the premises of the devisee of the quasi servient tenement—so long, at all events, as the mortgagee does not foreclose: *Pyer* v. *Carter* (1); *Thomas* v. *Owen* (2); *Wheeldon* v. *Burrows* (3)

(1) 1 H. & N. 916. (2) 20 Q. B. D. 225. (3) 12 Ch. D. 31.

[He also made use of the arguments and cited the authorities stated in the report of the hearing in the Court below.]

W. Baker, for the defendant, was not called upon.

LINDLEY, L.J. The judgment of the Divisional Court was quite correct. I shall assume, for the purpose of the observations I am about to make, that the plaintiff would have had, under the will, a right of way such as he claims, supposing that there had been no mortgage, and the matter turned upon the will alone. I am not sure that that is not going too far in his favour; but I will assume it, without expressing any opinion on it. In order to decide the question, we should have to look at a great many cases, and the cases upon the point run very fine. Then, how does the case stand upon this assumption? The plaintiff and the defendant are the devisees of these two houses, both of which belonged to the testatrix. They are both volunteers. What was the position of the property at the time the will was made, and what had the testatrix to leave? She had mortgaged the defendant's house on such terms that, as between herself and the mortgagee, she had no right of way at all. She had mortgaged all her estate and interest, and there was no reservation of this right of way as between her and the mortgagee; and it is admitted on behalf of the plaintiff, and I do not think it can possibly be denied, that supposing the mortgagee took possession, and the testatrix had not redeemed, the testatrix could not have enjoyed her right of way as against her mortgagee.

That being her position, she gives one house to the plaintiff's predecessor in title, and the other house to the defendant. Then the defendant pays off the mortgage. The defendant obtains for value, and has got everything that the mortgagee could give her as against the mortgagor. Now, the plaintiff says that he has an equity to deprive her of a portion of what she has got, and to deprive her of that portion without paying for it. That appears to me to be neither equity nor justice.

The plaintiff's counsel puts it on the ground that the mortgage has gone, and that the defendant, having paid off the mortgage, must be regarded, as between herself and the plaintiff, as merely the devisee of the house, and as if the mortgage transaction

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could be swept away altogether. That cannot be. The plaintiff's equity, if any, is to redeem that mortgage, or to contribute towards its redemption, and when he has done that he may have some rights, for anything I know; but that is not the question now. He says that, without contributing or paying anything, he is entitled to this right of way; and he puts it on the ground, which is familiar to all equity lawyers, that a mortgagor cannot set up his mortgage to defeat persons who claim under him. Of course he cannot. But that has nothing to do with a case like this, where one volunteer asserts an undiscoverable equity against another.

It seems to me that the Divisional Court was correct, and that the appeal must be dismissed; but I think it right to add that it must be dismissed without prejudice to the Plaintiff's rights, if any, to redeem the mortgage to which I have referred.

FRY, L.J. I am of the same opinion. It seems to me that no equity whatever is existing between the plaintiff and the defendant upon which the plaintiff can rely. The matter stands in this way. The plaintiff's counsel argues, and I will assume argues correctly, that under the devise the right of way (if any) passed to the Plaintiff. I assume that without expressing any opinion or inclination of opinion on the point. Now, if that be so, it follows that the mortgagee had a larger legal right than the equitable right of the defendant, Mrs. Knowles, under the devise, because he had not only the house in Bedford Street, but he had the passage through it free from the right of way. The defendant, according to the argument, had not. The mortgagee had therefore, as it were, a mortgage of two properties, A and B. Now the person entitled to the equity of redemption in A paid off the mortgage and took a conveyance of A and B. Is it possible to say that he has no right in B by reason of that conveyance? The plaintiff's counsel has said that the property was in mortgage, and that the payment off of the mortgage debt and the reconveyance of the mortgaged property only operated as a release of the property from the charge. That might be true in a case where the mortgage covered only the same property which the devise of the equity of redemption has vested in the person who takes the conveyance; but where the mortgagee conveys a legal

estate or an equitable estate in property, the equity of redemption in which is not vested in the person who takes the conveyance, the person who so takes the conveyance has a right larger than he would have had under a mere release.

Now the only other matter which requires consideration is this. Is there any equity to prevent the defendant from setting up the legal property which she obtained as assignee of the mortgage? Ex hypothesi that the mortgagee's estate was larger than the estate which the defendant took under the will, what is the equity to prevent her setting up the estate she has gained? The answer is that there is none. Here are two persons claiming as volunteers under the same person. The plaintiff may or may not have a right to come by way of contribution if the interests are comprised in the mortgage. About that I say nothing. To my mind, in this state of things, the defendant is entitled to set up every right which the mortgagee had; and, the plaintiff having no equity, the claim therefore fails.

LOPES, L.J. It seems to me that the short answer to the case is this, that Mrs. Bell had mortgaged this property without any reservation of any right of way at all, and had not this right of way to give at the time she made her will and died. What the position of things may be if the plaintiff redeems is a matter about which I express no opinion, nor do I desire to express an opinion as to whether or not this easement, if such it be, would amount to a continuing and apparent easement. I think the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Crossman & Pritchard; Williamson, Hill, & Co.*

W. W. K.

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Aug. 7.

[IN THE COURT OF APPEAL.]

IN RE BROWNE & WINGROVE. EX PARTE ADOR.

Bankruptcy—Proof of Debt—Interest—Debt payable at a future date with Interest in meantime—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 40; *Sched.* 2, *r.* 21.

The effect of the Bankruptcy Act, 1883, and r. 21 in Sched. 2 to the Act is that when a debt is by contract payable at a future date, with interest in the meantime, and the debtor becomes bankrupt before the time of payment has arrived, the creditor may prove for interest accruing after the date of the receiving order.

In such a case the proper course is to prove the principal sum as a present debt; then, under r. 21, to deduct a rebate of interest at 5 per cent. from the dividends upon it; and then to value the liability to pay interest and prove for that value, the dividend on which is to be paid without any rebate. If the rate of interest contracted for is 5 per cent. the proper course is simply to prove for the principal sum as a present debt, without any rebate.

APPEAL by a creditor from an order of one of the registrars disallowing a claim to prove for interest on a debt.

The debtors, who were partners, had jointly guaranteed to one Ador the payment, with interest, of a sum of 1000*l.* lent by him. The loan was made on April 30, 1885, for a period of ten years, "with a gradual amortization of 20 per cent., beginning after five years have elapsed, so as to completely extinguish the debt on April 30, 1895." Interest at the rate of 6 per cent. per annum was to be paid half yearly on the balance of the loan from time to time remaining due.

In March, 1890, the debtors presented a bankruptcy petition, on which a receiving order was made, and ultimately a scheme of arrangement with their creditors was approved of by the Court. No part of the principal of the loan had been repaid before the receiving order. Ador tendered a proof under the scheme for 1000*l.* principal, and 11*l.* 16*s.* 8*d.* interest thereon down to the date of the receiving order. The trustee under the scheme rejected the proof as regarded the interest and allowed it for the principal only, on the ground that the debtors had not guaranteed the payment of interest. Ador did not appeal from this rejection. The trustee afterwards proposed to pay him a dividend of 14*s.* in the

pound upon the 1000*l.*, reduced by a rebate of 210*l.* Ador then moved for an order that the trustee should pay him a dividend of 14*s.* in the pound on 1000*l.*, without any rebate or discount, or, in the alternative, that the proof might be increased.

The registrar dismissed the motion with costs. Ador appealed.

Finlay, Q.C., and *Yate Lee*, for the appellant. On the true construction of the document the debtors guaranteed the payment of the interest as well as the principal.

The omission to appeal against the trustee's rejection of the proof for 11*l.* 16*s.* 8*d.* interest does not preclude the appellant from now raising the point whether a proof for the interest can be admitted. Either rule 21 in the Second Schedule to the Bankruptcy Act, 1883 (1) does not apply at all to a debt which by

(1) By s. 37 of the Bankruptcy Act, 1883: "(1.) Demands in the nature of unliquidated damages, arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy.

"(2.) A person having notice of any act of bankruptcy available against a debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

"(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge, by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

"(8.) 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether the payment is as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or one, two, or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."

Sect. 40 provides (1.) that certain specified debts shall be paid in priority to all other debts; (4.) "subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu; and, (5.) If there is any surplus after payment of the foregoing debts it shall be applied in payment of interest from the date of the receiving order at the rate of 4 per cent. per annum on all debts proved in the bankruptcy."

By r. 21 in Sched. 2 to the Act: "A creditor may prove for a debt not payable when the debtor committed an act

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contract is payable in futuro, with interest in the meantime, or a proof for the interest should be admitted, and then the rebate of 5 per cent. should be deducted. It would be most unjust to deprive the creditor of interest altogether, and also to deduct the rebate from the principal. The result of such a rule in some cases would be that the creditor would get nothing at all. If, for instance, there was a debt of 1000*l.* payable at the end of twenty years, with interest at the rate of 5 per cent. in the meantime, the rebate at 5 per cent. would be equal to 1000*l.*, and, if a proof for interest was not allowed, the creditor would get nothing. The definition of "liability" in s. 37 is wide enough to include interest on a debt payable in futuro. In *Ex parte Bath* (1), though a proof for interest payable subsequently to the filing of a liquidation petition was disallowed, the present question did not arise. If necessary, that case ought to be reconsidered.

The Act 7 Geo. 1, c. 31, was the first Act which made debts payable at a future day provable in bankruptcy; but they were made provable subject to a rebate of interest. This provision has been continued by subsequent Bankruptcy Acts.

In *Ex parte Stone* (2), Mellish, L.J., said (at p. 917): "I can see no distinction with respect to proof between a sum payable immediately, and a sum payable at a future time, with interest in the meantime." The appellant is willing that his proof should stand for 1000*l.* simply, no rebate being deducted. Rule 21 applies only to a debt payable in futuro, without interest in the meantime.

Sidney Woolf, Q.C., and *F. M. Abrahams*, for the trustee.

First, The debtors guaranteed the payment of the principal only, not that of the interest. Secondly, The matter is res judicata, by reason of the trustee's rejection of the proof for 11*l.* 16*s.* 8*d.* interest, and the appellant's omission to appeal against the rejection within the twenty-one days limited by

of bankruptcy as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of 5 per cent. per annum, computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted."

(1) 22 Ch. D. 450.

(2) Law Rep. 8 Ch. 914.

rule 230 of the Bankruptcy Rules, 1886. Thirdly, Rule 21 applies to all debts payable in futuro, whether they bear interest in the meantime or not. The rule in bankruptcy has been long settled, that there can be no proof for interest accruing after the date of the adjudication—that is now, after the date of the receiving order. The origin of the rule is explained in Cooke's Bankruptcy Laws, 8th ed. vol. i. p. 205.

The rule was recognised as a subsisting rule in *Ex parte Bath* (1). The Bankruptcy Act, 1869, was then in force; but s. 31 of that Act was, for the present purpose, equivalent to s. 37 of the Bankruptcy Act, 1883.

[BOWEN, L.J., referred to *Hardy* v. *Fothergill.* (2)]

Sub-s. 5 of s. 40, implies that interest accruing after the receiving order is not provable, unless there is a surplus.

[KAY, L.J., referred to *Barnett* v. *King.* (3)

LINDLEY, L.J., referred to *Ex parte Dowman.* (4)]

Rule 353 of the Bankruptcy Rules, 1886, provides that the old practice in bankruptcy is to remain in force when no other provision is made by the Act of 1883 or the rules. Sect. 37 must be read in conjunction with s. 40. Rule 137 of the Bankruptcy Rules of 1870 was equivalent to sub-s. 5 of s. 40 of the Bankruptcy Act, 1883, and rule 77 of 1870 included r. 21 of the Second Schedule to the Bankruptcy Act, 1883. *Ex parte Bath* (1) is distinctly in point. It was decided in 1882, and s. 37 of the Bankruptcy Act, 1883, was afterwards enacted in substantially the same terms as s. 31 of the Bankruptcy Act, 1869. The rule forbidding proof for interest, except in the event of a surplus, has long existed in bankruptcy, and it is a good working rule. It cannot be disregarded without in effect overruling the decision of this Court in *Ex parte Bath.* (1) The rule was recognised by James, L.J., in *Ex parte Findlay.* (5) The decision in *Ex parte Stone* (6) has no application to the present case.

Finlay, Q.C., in reply.

Cur. adv. vult.

(1) 22 Ch. D. 450.
(2) 13 App. Cas. 351.
(3) [1891] 1 Ch. 4.
(4) 2 G. & J. 241.
(5) 45 L. T. (N.S.) 61.
(6) Law Rep. 8 Ch. 914.

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IN RE BROWNE & WINGROVE EX PARTE ADOR.

Aug. 7. The following judgment of the Court (Lindley, Bowen, and Kay, L.JJ.) was read by

LINDLEY, L.J. The first question which arises on this appeal is, whether the debtors guaranteed payment of the principal sum of 1000*l.* only, or of that sum with interest at 6 per cent. Their letter is reasonably plain, and amounts to a guarantee of the principal sum, and also of the interest on it. To construe it otherwise would be putting a very narrow and forced construction on it—a construction which we are convinced was neither intended by the writer, nor understood by the person to whom it was written, and who was intended to act upon it.

It was contended that an order had been already made which was inconsistent with this view, and that, that order not having been appealed from, it was not competent to the appellant to contend that the interest was guaranteed. The order in question, however, related only to a sum of 11*l.* 16*s.* 8*d.* for interest up to the date of the receiving order, and the appellant is content to have that sum rejected. The point now before the Court is a totally different one, and ought to be decided upon its merits, although that course unquestionably renders it necessary to reconsider the construction of the letter in question.

The debtors, therefore, must be treated as having guaranteed both principal and interest; and the question then arises, for what amount the creditor can prove, and how the sum payable to him for dividend is to be calculated. It has long been a settled rule in bankruptcy, that interest accruing after adjudication is not admitted to proof. Interest not yet due is clearly not a debt; and under the older statutes only debts were provable. Nor under them was interest given in respect of the delay necessarily occasioned by realizing the bankrupt's assets and ascertaining his debts. The old rule that interest accruing after adjudication could not be admitted to proof was inflexible (see Cooke's Bankruptcy Laws, 8th ed. vol. i. p. 205); and it has been recognised as subsisting in very modern times, notwithstanding that the class of liabilities provable has been from time to time enlarged, and has since 1869 embraced almost, if not quite, all contractual liabilities imaginable. It was recognised

and acted upon in *Ex parte Bath* (1), which was decided in November, 1882. But, notwithstanding this rule, and concurrently with it, there was a method of dealing with debts payable at a future date and bearing interest, which was introduced as early as the reign of George I., and which must not be forgotten. Until 7 Geo. 1, the only debts provable were debts due and payable at the date of adjudication. By 7 Geo. 1, c. 31, the law in this respect was altered, and as altered has continued in a modified form ever since. (See 6 Geo. 4, c. 16, s. 51, and the Bankruptcy Act, 1849, s. 172.) Under the Acts of George I. and George IV., debts payable at a later date than the adjudication were made provable subject to a rebate; and it was decided that debts payable in futuro, with interest in the meantime, were to be treated as if the principal sums were presently due without interest: see *Clayton* v. *Gosling* (2); *Ex parte Elgar* (3); *Ex parte Dowman.* (4) In the latter case a petition was presented by a creditor to be admitted to prove against the separate estate of one of the bankrupts, by virtue of a promissory note for 400*l.*, given by him to the petitioner for that amount received by him to her use. The note contained a promise to repay the 400*l.*, with 5 per cent. interest for the same. And it was agreed that six months' notice should be previously given before payment should be required. Interest on the note was paid up to August 20, 1822, and the commission issued on October 29, 1823. The commissioners rejected the proof, on the ground that no notice had been given, or demand made, before the issuing of the commission. The Vice-Chancellor affirmed the rejection. Lord Lyndhurst, L.C., held that the proof ought to be admitted. He said: "By the payment of interest this is clearly debitum in presenti solvendum in futuro, the time of the solvendum depending upon the fact of notice. This is the opinion of Lord Eldon in *Ex parte Elgar* (3), and by that case I feel myself bound; and the case before the Court seems to be the same in principle . . . By the payment of interest, then, we must look upon this as an immediate debt; and where a day is fixed for payment after the bankruptcy, the proof is admissible upon rebating the interest.

(1) 22 Ch. D. 450.
(2) 5 B. & C. 360.
(3) 2 G. & J. 1.
(4) 2 G. & J. 241.

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Now, if no interest were reserved, the calculation of rebate would be impossible; but, interest being reserved in the present case, the debt may be proved subject to such rebate; and in this mode: the debt being payable six months after notice, and bankruptcy occurring, all we have to do is to drop the six months' interest anterior to the bankruptcy, and the same result is produced as the rebate upon a bill of exchange." The observations of Mellish, L.J., in *Ex parte Stone* (1) are to the same effect. Later legislation has not altered this in principle. The point did not arise in *Ex parte Savin* (2), where the debt was a debt actually due. In *Ex parte Bath* (3) proof for future interest was disallowed, which is quite in accordance with the old rule; but the whole of the principal was proved as a present debt, which was also in accordance with the same rule. The report does not shew that any deduction was afterwards made from the principal money proved. Nor was the question raised whether the liability to pay interest could be valued for purposes of proof. *Ex parte Bath* (3) is therefore no authority for the double proposition, that the future interest is to be rejected, and that the principal sum is to be further reduced under some rule relating to rebate. So far as decided cases go, we can find no authority for such a very unreasonable mode of procedure.

We come now to the present statute. The only express provisions relating to interest in the Bankruptcy Act, 1883, and the Rules of 1886 are s. 40, sub-s. 5, and rule 20 in the Second Schedule to the Act. Sect. 40, sub-s. 5, applies to interest after the date of the receiving order; it applies to all debts proved, whether they bear interest or not (thus extending the old law, Cooke's Bankruptcy Law, 8th ed. vol. i. p. 207); it gives interest on all debts proved at 4 per cent. from the above date; but it only comes into operation where there is a surplus after payment in full of all the debts proved. Rule 20 in the schedule applies to interest before the receiving order, and gives interest down to the date of that order at 4 per cent. on all debts or sums certain then overdue, although interest is not payable by contract, provided the debts are payable by virtue of some written instru-

(1) Law Rep. 8 Ch. 917. (2) Law Rep. 7 Ch. 760.
(3) 22 Ch. D. 450.

ment at a certain time, or a demand has been made in writing for payment and giving notice that interest will be claimed. Neither of these provisions has reference to the mode of dealing with interest after the date of the receiving order on a debt payable at a future date, with interest, under an express contract. The enactments relating to debts provable are s. 37 and rule 21 in the schedule. These have to be worked together. The language of s. 37 is quite large enough to include not only a debt payable at a future date, but also a liability to pay interest thereon at such rate, high or low, as the bankrupt may have agreed to pay; and upon the true construction of s. 37 and rule 21 the proper course to pursue appears to be as follows: first, prove the debt as a present debt, and apply rule 21 to the dividend payable on it; then value the liability to pay interest and prove for that value, and pay a dividend on that without rebate (see the words of rule 21, which is confined to debts). If by contract the debt bears interest at 5 per cent., then, as under the rule interest is to be calculated at 5 per cent. for the purposes of rebate, the result will be the same as if the principal sum is treated as a present debt not bearing interest, and is proved and paid accordingly. But, where the interest is more or less than 5 per cent., the value of the liability to pay interest and the rebate under the rule will not be equal, and will not therefore neutralize each other. Whether it was intended to alter the old law by which a debt payable at a future date with interest was treated as presently payable without interest we do not know, but certainly it cannot have been intended, first, to strike out the interest, and then reduce the principal by applying rule 21 to it. That, however, is what has been done by the order appealed from; but there is no warrant for so doing either under the old law or the new. The rule which prevents proof for future interest is not a positive enactment, it is rather a rule of convenience. In ordinary cases it produces no injustice. Where by rule 21 a rebate would be deducted from a future debt which by contract carries interest, the application of s. 37, by allowing a proof for such future interest and setting that off against the rebate, prevents the operation of rule 21 from inflicting a loss upon the creditor by a rebate which would be unjust. If the proof for future interest

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should be greater than the rebate under rule 21, as when the interest contracted for is more than 5 per cent., possibly s. 37 could not be invoked so far as to allow proof for the amount beyond the rebate. But it is not necessary on the present occasion to decide this point. In the present case the interest payable by the contract is 6 per cent. The appellant is content to allow the principal sum alone to be the amount of his proof, and to waive any advantage he might obtain by valuing the debtors' liability to pay 6 per cent. and then applying rule 21. This being so, the proof will stand for 1000*l.*, and there will be no rebate from that or from the dividend payable in respect of it. The appeal, therefore, is allowed, with costs in the usual way.

Appeal allowed.

The Court gave leave to appeal to the House of Lords upon the consent being obtained of two-thirds in value of the creditors present in person or by proxy at a meeting to be summoned for the purpose.

Solicitors for appellant: *Munns & Longden.*
Solicitors for trustee: *M. Abrahams, Sons & Co.*

W. L. C

July 27.

DEVEREUX *v.* CLARKE & CO.

Practice—Particulars—Libel—Justification.

The plaintiff applied for an order for particulars of a defence of justification pleaded to an action for libel contained in a review of a book written by him. The review stated that the plaintiff was, by his own confession, a most barefaced liar:—

Held, that the plaintiff was entitled to particulars of the passages in his book on which the defendants relied in support of the defence of justification, and that such particulars must specify the pages in the book at which the several passages relied on occurred, and the first and last words of such passages.

APPLICATION by the plaintiff for particulars of a defence of justification in an action for libel.

The alleged libel was contained in a review, in a weekly publication called the *Literary World*, of a book written by the plaintiff, which had been sent to that publication to be reviewed.

The title of the book was '"Roughing it," by "Rux,"' and the statement of claim alleged that the defendants in reviewing the book had printed and published, among other statements, the following: "Rux (meaning the plaintiff) is, by his own confession, a most barefaced liar."

The defendants justified, pleading the truth of the alleged libel, and the plaintiff applied for an order for particulars of the defence of justification.

The master refused to make an order, and Lawrance, J., affirmed his decision.

The plaintiff appealed.

Hugh Fraser, for the plaintiff. The defendants ought to be ordered to point out what passages in the alleged libel they rely upon as true statements of fact, and to distinguish such passages from those which they intend to rely upon as fair criticism. Otherwise the defence is embarrassing: *Fleming* v. *Dollar*. (1)

Colam, for the defendants. The statement complained of is a plain statement of fact, and no particulars are required. In any case the plaintiff is asking for too much.

DENMAN, J. I am of opinion that this appeal ought to be allowed, and in substance our order amounts to allowing the whole appeal. The action is brought to recover damages for an alleged libel contained in a review of a book written by the plaintiff. The most material passage, which is set out in the statement of claim, is as follows: "Rux (meaning the plaintiff) is, by his own confession, a most barefaced liar." The rest of the article is mainly an amplification of that statement, going into details. The plaintiff has taken out a summons for particulars of the justification. A long book having been reviewed, it is not unreasonable for the plaintiff to claim that, as the defendants allege that he is, on his own confession, a barefaced liar, they ought to be called upon to point out to him anything in the book which they intend to rely upon as amounting to such a confession. The plaintiff has a right to have some information to point to the particular passages relied upon by the

(1) 23 Q. B. D. 388.

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defendants. There is no difficulty in the defendants' way which can prevent their being able to state what passages they rely upon.

The defendants must furnish particulars specifying the pages and the first and last words of the several passages on which they intend to rely in support of the defence of justification.

HENN COLLINS, J., concurred.

Appeal allowed.

Solicitor for plaintiff: *Charles Turner.*

Solicitors for defendants: *Justice & Co.*

P. B. H.

Aug. 12.

GURNEY *v.* SMALL.

Practice—Writ specially indorsed—Application for Judgment—Amendment of Indorsement after Summons taken out—Order III., r. 6; Order XIV., r. 1.

In order to entitle a plaintiff to enter final judgment under Order XIV., r. 1, the writ of summons must be a good specially indorsed writ under Order III., r. 6, at the time when the summons under Order XIV. is taken out. Where, therefore, the indorsement on a writ was amended after the issue of a summons under Order XIV. by striking out an unliquidated demand:—

Held, that there was no jurisdiction to make an order giving the plaintiff leave to enter final judgment.

APPEAL against an order of a master giving the plaintiff leave to sign final judgment under Order XIV., r. 1, referred by Pollock, B., at chambers, to the Court.

The writ in the action, which was issued on June 27, 1891, was indorsed with a claim for 132*l.* 9*s.* 1*d.*, which was admittedly a liquidated sum, and with a further claim in respect of the use and occupation by the defendant of premises belonging to the plaintiff. The defendant appeared to the writ on July 6, and on July 17 the plaintiff took out a summons for final judgment under Order XIV., r. 1. On July 28 the summons was heard before the master, when the defendant objected that, as the writ contained a claim for use and occupation in addition to a claim for a liquidated sum, it was not a specially indorsed writ within the meaning of Order III., r. 6; the master thereupon adjourned the summons, giving the plaintiff leave to amend the indorsement

on the writ by striking out the claim for use and occupation; this amendment was duly made, and a copy of the writ so amended was served on the defendant's solicitors. On August 6 the adjourned summons under Order XIV. came on before the master, when the defendant put in no affidavit of merits, but objected that the master had no jurisdiction to make the order, upon the grounds, (1.) that the defendant had not appeared to a specially indorsed writ within the meaning of Order XIV., r. 1, the writ not having been a specially indorsed writ at the time when his appearance in the action was entered; (2.) that, at any rate, it was necessary that the writ should be a specially indorsed writ within the meaning of Order III., r. 6, at the time when the summons for leave to sign final judgment was taken out. The master overruled the objection, and, there being no affidavit of merits, made an order that the plaintiff be at liberty to enter final judgment.

Henry Kisch, for the defendant. There was no jurisdiction to give leave to enter final judgment, for the conditions did not exist under which alone that jurisdiction can be exercised. In order to entitle a plaintiff to a summary order for final judgment the writ of summons must have been specially indorsed under Order III., r. 6, at the time of the defendant's appearance, or at any rate at the time when the summons for leave to sign judgment is taken out. In the present case the writ was clearly not specially indorsed at either of those dates; for to a claim for a specific liquidated amount there was joined one for use and occupation, and the indorsement was a bad special indorsement within the decision in *Imbert-Terry* v. *Carver*. (1) The subsequent amendment of the indorsement cannot give jurisdiction to make this order; it cannot antedate the special indorsement so as to make the writ a good specially indorsed writ at the time when the defendant appeared or the summons for leave to enter final judgment was taken out. The appearance of the defendant to a specially indorsed writ is a condition precedent to the exercise of this jurisdiction, as seems clear from the language of Lord Esher, M.R., with regard to Order XIV. in *Shurmur* v.

(1) 34 Ch. D. 506.

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Young (1): "By Order XIV. the plaintiff must first indorse the writ specially."

Arthur Powell, for the plaintiff. The order was right. The special indorsement of the writ is not a condition precedent to the issue of the summons: this has been decided in *Robinson* v. *Ralston* (2), which is identical with the present case.

[WILLS, J. In that case it was assumed as the very foundation of the judgment that the defendant had appeared to a specially indorsed writ.]

In the present case the writ was specially indorsed ab initio; it may have had a blemish which required to be cured, but it was none the less a specially indorsed writ. If the writ was not specially indorsed until the amendment was made, it then became as though it had been issued originally in that form; the amendment was made nunc pro tunc, and thereupon the jurisdiction under Order XIV. attached.

WILLS, J. This seems a very plain case. It must be remembered that the right to obtain final judgment in a summary manner is one of purely statutory creation; it is no part of the common law jurisdiction of the Court, but is given by rules which have the force of an Act of Parliament, and it is only exercise-able in the cases provided for in and subject to the conditions imposed by those rules. By Order XIV., r. 1, a plaintiff may apply for leave to sign final judgment, and the jurisdiction of the Court, if it has attached, may be exercised in his favour; but it can only be exercised where the previous portion of that rule is applicable and the case can be brought within it. Under that rule the defendant must appear to a writ of summons specially indorsed under Order III., r. 6; and in the present case it is perfectly clear that the writ to which the defendant originally appeared was not so specially indorsed; to hold otherwise would be to deprive the expression "seeks *only* to recover" in that rule of all its significance. The operation of Order XIV., r. 1, is confined, therefore, to the case of a defendant appearing to a writ of summons specially indorsed with a liquidated demand under Order III., r. 6, and with nothing else. Where

(1) 33 Sol. J. 155.

(2) 8 Ir. L. Rep. 26.

that is the case, leave may be given to enter judgment "for the amount so indorsed"—an expression which shews, if further argument were necessary, that the order is only intended to apply to writs previously specially indorsed under Order III., r. 6.

In the present case the plaintiff, at the time when he took out this summons, had no right to take it out, for there was then no specially indorsed writ under Order III., r. 6, and the defendant had therefore not appeared to a writ specially indorsed under that rule. And this original defect is not cured by the subsequent amendment of the indorsement; for where, in order that jurisdiction may attach, it is necessary that a certain state of circumstances should exist at a certain time, it cannot be said that that state of circumstances then existed because something is done subsequently to that time, and subsequently to the time at which it is contended that the jurisdiction attached. It is necessary that at the time when the summons under Order XIV. is taken out that the indorsement on the writ should be in the required form. It has been suggested that after amendment of the indorsement a fresh summons under Order XIV. might properly have been taken out without the necessity of a fresh appearance by the defendant, and I do not say that that would not be sufficient. I desire to offer no opinion on that point; it may be that the defendant might properly allow his original appearance to stand as an appearance to the amended writ, and that upon the issue of a fresh summons the conditions would be held to be complied with and the jurisdiction of the Court would attach. But the amendment of the writ cannot be antedated, and it is impossible to say that this indorsement, which was, in fact, amended after July 28, was amended on July 17, the day when the summons was taken out, so as to make it a specially indorsed writ under Order III., r. 6, upon that day. In very special cases indeed orders may be made nunc pro tunc, but not where the making of an amendment may alter the whole of the rights of the parties.

In the Irish case of *Robinson* v. *Ralston* (1), this matter was very little discussed, and the judgment of the Irish Court of Appeal seems to have proceeded upon the supposition that the

(1) 8 Ir. L. Rep. 26.

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writ was specially indorsed under the corresponding Irish rule at the time of the defendant's appearance; but I am entirely unable to agree with that view, which conflicts with the view taken in this country in *Clarke* v. *Berger*. (1) I am clearly of opinion that this appeal must succeed.

CHARLES, J. I am of the same opinion, and have nothing to add.

Appeal allowed.

Solicitors for plaintiff: *Leslie Antill & Arnold.*

Solicitors for defendant: *George Kebbell & Miller.*

W. J. B.

C. A.

July 28.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* TYLER AND THE INTERNATIONAL COMMERCIAL COMPANY, LIMITED.

Practice—Appeal—"Criminal Cause or Matter"—Joint Stock Company—List of Members—Default in forwarding List to Registrar—Mandamus to hear Application for Summons—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 26, 27—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

A magistrate having refused to issue a summons under s. 27 of the Companies Act, 1862, against a company, to recover penalties for default in forwarding a list of its members to the Registrar of Joint Stock Companies as required by s. 26 of the Act, the Queen's Bench Division granted a rule nisi for a mandamus directing him to hear and determine the application for a summons. The rule was by a subsequent order of the Court discharged. On appeal against this order:—

Held, that the application to the magistrate for a summons against the company was a criminal proceeding, and that, therefore, the judgment of the Queen's Bench Division was a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, and that no appeal would lie.

APPEAL from the judgment of the Queen's Bench Division discharging a rule nisi for a mandamus.

It appeared that one Noton applied to Alderman Tyler, a magistrate of the City of London, sitting at the Mansion House, for a summons against the International Commercial Company, Limited, under s. 27 of the Companies Act, 1862, upon an information charging the company with having made default in

(1) 36 W. R. 809.

forwarding to the Registrar of Joint Stock Companies a copy of the list of members of the company, as required by s. 26 of the Act. (1) The magistrate refused to issue a summons, and the applicant thereupon obtained a rule nisi for a mandamus to compel the magistrate to hear and determine the application for a summons, on the ground that he had declined to exercise jurisdiction The Queen's Bench Division discharged the rule. The applicant appealed, and the preliminary objection was taken that no appeal lay, the judgment of the Queen's Bench Division being a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873.

Pitt Lewis, Q.C., and *Jarvis*, for the appellant. This proceeding before the magistrate against a joint stock company for the recovery of penalties under s. 27 of the Companies Act, 1862, was not a "criminal cause or matter." A joint stock company, being a corporation, cannot be guilty of a criminal act. It cannot have a mens rea. A corporation cannot be sued for malicious prosecution, as it is incapable of malice or motive: per Lord Bramwell in *Abrath* v. *North Eastern Ry. Co.* (2) In *Attorney General* v. *Bradlaugh* (3), Lord Esher, M.R., said that to constitute a crime there must be a wrongful intent. Therefore, the proceedings before the magistrate were not criminal proceedings. Secondly, ss. 26 and 27 do not create a criminal

(1) 25 & 26 Vict. c. 89, s. 26: "Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company" (such list to contain a summary of certain particulars). "The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the Registrar of Joint Stock Companies."

Sect. 27: "If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the Registrar, such company shall incur a penalty not exceeding 5*l.* for every day during which such default continues; and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty."

(2) 11 App. Cas. 247, at p. 251.

(3) 14 Q. B. D. 667, at p. 689.

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offence. Sect. 27 says that the company shall "incur a penalty," not shall be "convicted"; and s. 66 directs how the penalties are to be applied. Proceedings for penalties under the Smuggling Acts are not criminal proceedings: *Ex parte Beeching* (1); *Attorney General* v. *Siddon.* (2). So a proceeding in the Ecclesiastical Court against a clerk to recover penalties for non-residence is not a criminal suit: *Rackham* v. *Bluck* (3); and in *In re Eggington* (4), a conviction and committal by justices of a town clerk for wilfully refusing to deliver up the books were held to be civil and not criminal proceedings. The test, as stated in Paley on Summary Convictions, 6th ed. p. 116, is whether imprisonment would follow the conviction in the first instance or whether a pecuniary penalty would be the proximate result. Sect. 27 merely provides a means of getting the money payable upon breach of the provisions of s. 26. Moreover, by s. 27 the directors and manager of a company who shall "knowingly and wilfully" permit a default by the company are liable to a penalty. Those words were expressly added in the case of the directors and manager to change what is a civil matter as regards the company into a criminal matter as regards the directors and manager. [They also, upon this point, referred to *Mellor* v. *Denham* (5); *Reg.* v. *Holl* (6); *Reg.* v. *Whitchurch* (7); *Reg.* v. *Paget* (8); *Attorney General* v. *Bradlaugh* (9); *Loughborough Highway Board* v. *Curzon* (10); *Ex parte Schofield* (11); Summary Jurisdiction Act, 1879, s. 6.]

G. Humphreys, for the magistrate. A corporation can be guilty of a criminal offence. In *Reg.* v. *Birmingham and Gloucester Ry. Co.* (12), it was held that a corporation could be indicted for a breach of duty imposed upon it by law; and in *Reg.* v. *Great North of England Ry. Co.* (13) it was held that a corporation might be indicted for a misfeasance, as in cutting through and obstructing a highway; and in *Reg.* v. *United Kingdom Electric Telegraph*

(1) 4 B. & C. 136.
(2) 1 C. & J. 220.
(3) 9 Q. B. 691.
(4) 2 E. & B. 717.
(5) 5 Q. B. D. 467.
(6) 7 Q. B. D. 575.
(7) 7 Q. B. D. 534.
(8) 8 Q. B. D. 151.
(9) 14 Q. B. D. 667.
(10) 17 Q. B. D. 344.
(11) [1891] 2 Q. B. 428.
(12) 3 Q. B. 223.
(13) 9 Q. B. 315.

Co. (1) it was not suggested that an indictment would not lie against a corporation for a misfeasance. Then, as regards the question whether ss. 26 and 27 make this breach of the statute a criminal offence in the company, if it is an offence in the directors it must be equally an offence in the case of the company. The penalty is the same in each case, and the words imposing the penalty are the same. The sections direct the company to do a certain act, and provide a penalty to punish the company for any breach, and thus compel them to do the act. The case of *Mellor* v. *Denham* (2) is in point. That case shews that disobedience to a bye-law in neglecting to send a child to school, which renders the person liable to a penalty, is a criminal matter. The smuggling cases cited were merely proceedings taken with a view to get in the revenue, and were in the nature of civil proceedings: *Cattell* v. *Ireson.* (3) *Reg.* v. *Holl* (4) and *Attorney General* v. *Bradlaugh* (5) were not cases before magistrates. *Ex parte Schofield* (6) shews that, this being a step in a criminal proceeding, no appeal lies. [He also referred to *Osborne* v. *Milman.* (7)]

Murphy, Q.C., and *J. E. Palmer*, for the company.

Pitt Lewis, Q.C., replied.

BOWEN, L.J. This is an appeal from the judgment of the Queen's Bench Division discharging a rule nisi for a mandamus directed to Alderman Tyler to hear and determine the matter of a complaint by the prosecutor against the International Commercial Company, Limited, under s. 27 of the Companies Act, 1862. A preliminary objection has been taken that this Court has no jurisdiction to entertain the appeal, on the ground that the judgment of the High Court was a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873. That in many instances proceedings before justices for the recovery of penalties under an Act of Parliament are criminal causes or matters has been shewn in a number of cases before this Court, from the cases of *Mellor* v. *Denham* (2) and *Reg.* v. *Whitchurch* (8),

(1) 31 L. J. (M C.) 166.
(2) 5 Q. B. D. 467.
(3) E. B. & E. 91; 27 L. J. (M.C.) 167.
(4) 7 Q. B. D. 575.
(5) 14 Q. B. D. 667.
(6) [1891] 2 Q. B. 428.
(7) 18 Q. B. D. 471.
(8) 7 Q. B. D. 534.

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down to the last case upon the subject—namely, *Ex parte Schofield.* (1) What we have to inquire is whether a proceeding against a company for penalties under s. 27 of the Companies Act, 1862, is or is not a criminal cause or matter. We must first consider the preceding section, because it is by reason of an alleged default in complying with the provisions of that section that the proceedings before the magistrate are initiated. The preceding section requires a list of members, containing certain particulars, to be kept by a company, and a copy of the list to be sent once a year to the registrar of joint stock companies. Now if s. 26 stood alone, it could not be doubted that it created a duty in the company, and that if the company did not comply with the directions of the section the company would commit a breach of duty. There would be in such a case a disobedience of the law. It was first contended on behalf of the appellant that no criminal proceedings can be taken against a company, and it becomes necessary, therefore, in order to make the steps of our reasoning clear, that we should examine that proposition and see if there is anything in it. It would seem contrary to sound sense and reason if such a technical objection could succeed. Where, for instance, a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the enactment by the company be otherwise dealt with? The directors or officers of the company, who are really responsible for the neglect of the company to comply with the statutory requirements, might not be struck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by way of indictment. It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company

(1) [1891] 2 Q. B. 428.

by means of an indictment. That was laid down in *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1), where Patteson, J., in delivering the judgment of the Court, said that "as a general proposition . . . a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults." That was a case of nonfeasance; but the same doctrine was applied to cases of misfeasance in *Reg.* v. *Great North of England Ry. Co.* (2), where Lord Denman, who delivered the judgment of the Court, said: "The argument is that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards." And he says that in *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1), though a case of nonfeasance only, the Court did not intend to lay down that nonfeasance was the only disobedience to the law for which a corporation was punishable by indictment. The same question was considered incidentally by Cockburn, C.J., in *Pharmaceutical Society* v. *London Supply Association* (3), where he says: "Although it is true that a corporation cannot be indicted for treason or felony, it was established by the case of *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1) that an incorporated company might be indicted for nonfeasance in omitting to perform a duty imposed by the statute—such as that of making arches to connect lands severed by the defendants' railway. It was further held in *Reg.* v. *Great North of England Ry. Co.* (2) that an incorporated company could be indicted for misfeasance—as in cutting through and obstructing a highway, though they could not be indicted for treason, or felony, or offences against the person."

(1) 3 Q. B. 223. (2) 9 Q. B. 315.
(3) 4 Q. B. D. 313, at p. 319.

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I take it, therefore, to be clear that, in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by shewing that they are a corporation. That seems to me to be common sense and good law.

It was then said that a section in an Act of Parliament which directs an act to be done does not necessarily make the disobedience an offence if the Act proceeds to impose a penalty as the only result of non-compliance with the directions of the section. Now, it is true that there are statutes which do not create an imperative and positive duty to the public, but which only impose, as the result of non-compliance with the directions of the statute, a pecuniary loss on the individual who does not so comply. In such a case it is not the intention of the legislature to make the disobedience of the law a misdemeanour; it is only the intention to provide that if the person does not comply with the directions of the statute he must submit to the penalty. In each case it is a question of the construction of the Act to see if that is what is meant. We must therefore examine s. 27 before we can decide whether the true view is that this Act merely states certain matters which are to be performed by a company, with this result only, that if the company does not perform them it may escape by paying the penalty; or whether the true view is not this, that a positive duty is imposed upon the company and an appropriate remedy given—a remedy, however, which is intended to be enforced in the interests of the public, and one which does not prevent the failure of the company to comply with the requirements of the preceding section from being a disobedience to the law and a wrongful act. It seems to me that s. 27, when it is looked at, so far from shewing that the breach of the requirements by the company of s. 26 is not a disobedience to the law, shews most clearly that it is; and that this does not belong to the class of cases in which the statute does not intend the breach of its provisions to be an offence, but merely intends such breach to be a condition precedent to the recovery of a particular pecuniary compensation. Sect. 27,

therefore, throws light on s. 26, and shews that a breach of s. 26 is an offence, and that a proceeding under s. 27 is a criminal proceeding. It would indeed be a remarkable view for the legislature to take, that the obligation imposed upon a company was of such a nature that its breach by the company was not an offence, and yet that a director or manager of the company who stood by and acquiesced in the breach was guilty of an offence. Such a reading of the statute would emancipate the corporation, upon whom the duty was imposed, from the position of offender, and would introduce into the class of offenders the directors and managers only who stood by and knowingly acquiesced. I cannot think that that is the true reading of the sections. It seems to me that the reason why the words "knowingly and wilfully" are introduced into s. 27 as a condition of the directors' and managers' default, and are omitted in the case of the company, is that the duty is imposed upon the company. The directors are to be punished if they stand by and permit the company to be in default, but the company is not thereby the less in default, nor is the character of that default altered. I think that the words "knowingly and wilfully" are to be explained in that way, and, reading the section in that light, it is perfectly clear that the preceding section creates a duty the neglect of which is disobedience to the law and an offence. Therefore, a breach of the provisions of s. 26 is an offence, and it is none the less an offence because s. 27 imposes a pecuniary penalty as the punishment for the offence. Sect. 27 gives a summary remedy either in addition to or in place of an elaborate and circuitous one. It is not necessary to discuss the question whether, under this statute, an indictment would lie in this case notwithstanding the summary remedy given by s. 27. It is sufficient to say that the mere creation of a summary remedy does not shew that disobedience to the provisions of s. 26 is not a disobedience to the law amounting to an offence. If it is an offence for the company to fail to comply with the requirements of s. 26, then a proceeding against the company under s. 27 is a proceeding in the nature of a criminal cause or matter, its object being the punishment of an offence.

That appears to me to be the true meaning of the section, and

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if we were not to come to this conclusion we should be drawing a distinction so fine as to be almost pedantic between the case of the company and the case of the directors and manager, who would be guilty of an offence in knowingly and wilfully permitting that which in the company was not an offence at all. The Act says that a company shall do certain things, and a company which neglects to do those things is a criminal offender. That being so, this appeal cannot be entertained upon the ground that this Court has no jurisdiction to hear matters which belong to the criminal jurisdiction of the Courts of the country, the intention of the Judicature Act being to keep that class of case beyond the scope and reach of the Court of Appeal. This appeal must therefore be dismissed.

KAY, L.J. I am of the same opinion. The more closely this part of the Companies Act, 1862, is examined, the more plainly it appears to my mind that a very important duty is imposed upon joint stock companies by s. 26. Sect. 25 requires a company to keep a register of its members; and s. 26 requires a company once a year to make a list of members of the company, specifying certain particulars, such list to be contained in a separate part of the register, and to forward a copy of the list to the Registrar of Joint Stock Companies. By s. 32 the register is to be open to the inspection of the shareholders and the public. The object, therefore, is that this list which is contemplated by s. 26 should be entered in the company's register so as to be open to inspection. That is a very important duty in the interests not only of the shareholders, but also of the public, who have the right, upon payment of a mere nominal sum, to inspect the register and list. Sects. 25 and 26 being imperative in their terms, and imposing upon the company the duty of keeping this register and inserting in it from time to time this list, and forwarding a copy of the list to the registrar, s. 27 imposes a penalty for the omission to forward the list. I think it is impossible to read s. 27 without seeing that the penalty is not intended to be the equivalent for the omission to perform the duty imposed upon the company by s. 26, but is of such a nature that the company cannot by paying the penalty continue to neglect to perform the

duty, because the penalty imposed is a penalty of 5*l.* a day during which the default continues. Therefore, it seems to me to be plain that this Act does impose upon a company an important duty in this respect, and that s. 27 renders the company liable to a penalty of such a character and so easily enforced that to my mind the conclusion is inevitable that it was intended as a punishment of such a nature as should compel the company to comply with the directions of s. 26. I take it to be clear that where an Act imposes upon a company a duty to perform a particular act, and does not provide any other remedy, the company, though a corporation, may be indicted for non-performance of that Act. In *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1) the act which the statute directed the company to perform was to build certain arches to connect lands which had been severed by the railway, and they were ordered by justices to build the arches, but omitted to do so. Patteson, J., says that, "a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults." The duty there was imposed by statute, and the language of the learned judge means that the omission to perform the duty was a criminal act on the part of the company for which it might be indicted. That case has been referred to with approval in *Pharmaceutical Society* v. *London Supply Association* (2), and in *London Joint Stock Bank* v. *Mayor of London* (3), and it has been carried further, and the same law has been held to apply to a case of misfeasance. Therefore, that part of the argument, that, inasmuch as a criminal act involves a mens rea, a corporation which has no mens at all is not subject to criminal proceedings in any case, is untenable. That brings me back to the question whether the statute means that the disobedience of the company to the positive requirements of s. 26 is not to be a criminal offence, but a breach which may be compensated by the payment of the penalty. I agree that there may be cases in which the omission to perform an act which a statute prescribes to be done may be so completely compensated by a penalty that the statute may be construed as meaning that

(1) 3 Q. B. 223. (2) 4 Q. B. D. 313.
(3) 1 C. P. D. 1.

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the person or corporation may either perform the act or pay the penalty. But I am satisfied that that is not the meaning of this statute. It seems to me that the penalty here is a penalty properly so called. It is inflicted by way of punishment, and not by way of compensation for the breach. It is not necessary to inquire whether the company could be indicted for the nonfeasance under this Act, because the Act meant to impose upon the company a positive duty, the omission to perform which would be in the nature of a criminal offence, and even if the remedy given by the Act is the only remedy, as to which I express no opinion, it does not follow that the omission to do the Act is any the less a criminal omission on the part of the company. For these reasons I agree that we cannot entertain this appeal.

Appeal dismissed.

Solicitor for appellant: *The Appellant in person.*
Solicitors for respondents: *The City Solicitor; T. Durant.*

A. M.

C. A
June 17; *July* 28.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE REGISTRAR OF JOINT STOCK COMPANIES. EX PARTE JOHNSTON.

Company—Registration—Private Partnership—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Part VII. s.* 180—"*Company duly constituted by Law.*"

A partnership formed not for carrying on a business, but simply for the purpose of being incorporated under the Companies Act, 1862, in order that it may be forthwith wound up, cannot be registered as a company under Part VII. of that Act.

Whether a partnership which is constituted solely by contract between the members is "a company duly constituted by law" under s. 180 of the Companies Act, 1862, so as to be qualified for registration under Part VII., *quære.*

The decision of Cave and Charles, JJ., reversed.

THIS was an application by C. E. Johnston to register a company under Part VII. of the Companies Act, 1862 (25 & 26 Vict. c. 89), under the following circumstances.

The applicant and six other gentlemen had for some years carried on the business of booksellers and publishers under the style of W. H. Allen & Co. Shortly before the execution of the

deed hereinafter stated, the partners sold their business and assets to a joint stock company incorporated under the Companies Acts, under the name of W. H. Allen & Co., Limited, in consideration of 20,000 fully paid-up shares of 5*l.* each in the new company.

On March 13, 1891, the seven partners executed a deed which recited the existence of the partnership and the sale of the business to the new company, and that the 20,000 shares in the new company were then the only assets of the partnership; and recited that the partners were desirous of defining the terms of their existing copartnership, with the modification thereinafter appearing, with a view to the registration of such copartnership as an unlimited company under Part VII. of the Companies Act, 1862. And it was witnessed that each of the partners covenanted with the others of them that the partners, and the several other parties (if any) who should become members of the company thereby constituted, should, whilst holding shares in the capital of such company, be and continue, until dissolved under the provisions thereinafter contained, a company under the name thereinafter specified, and that such company should be subject to the regulations thereinafter mentioned. Among the regulations were the following:—

"That until after the registration of the company there shall not at any time be more than twenty members."

"The objects for which the company is established are to continue and carry on the partnership hitherto existing between the partners, and to realize and get in the assets of the copartnership, and to satisfy its liabilities, and to do all such other things as are incidental or conducive to the attainment of the above objects."

"The capital of the company shall be 770*l.* divided into 77 shares of 10*l.* each."

"The said 20,000 shares of W. H. Allen & Co. shall be brought into the company by the partners."

"The partners shall be the first directors of the company."

"The provisions contained in Table A in the First Schedule to the Companies Act, 1862, except those numbered 23, 24, 25, 52, and 53, shall apply to the company as if they were herein set forth at length."

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"The company may at any time before its registration be dissolved by special resolution, and when such a resolution is passed the affairs of the company shall be wound up by the directors or otherwise as by special resolution directed."

The seven partners held a meeting on March 24, 1891, at which they passed a resolution that the company should be wound up as an unlimited company, pursuant to the provisions of Part VII. of the Companies Act, 1862.

The applicant accordingly, on behalf of the company, left with the Registrar of Joint Stock Companies the papers and documents required by ss. 183 and 184 of the Companies Act, 1862, together with an application for the company to be registered as an unlimited company under s. 180 in Part VII. of the Act (1).

The Registrar refused to register the company; and the applicant obtained a rule nisi for a mandamus to compel him to register it.

1891. May 12. The Registrar shewed cause against the rule.

Sir R. E. Webster, A.G., Ingle Joyce, and *H. Sutton,* for the Registrar.

Finlay, Q.C., and *Theobald,* for the applicant.

Cur. adv. vult.

1891. June 17. The judgment of the Court (Cave and Charles, JJ.) was read by

CAVE, J. The question we have to decide in this case is whether an ordinary partnership of not less than seven persons

(1) 25 & 26 Vict. c. 89, s. 180, is as follows: "With the above exceptions and subject to the foregoing regulations, every company existing at the time of the commencement of this Act, including any company registered under the said Joint Stock Companies Acts, consisting of seven or more members, and any company hereafter formed, in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up."

can be registered under s. 180 of the Companies Act, 1862. For the negative it was contended, first, that such a partnership was not a company at all; secondly, that, if a company, it was not a company duly constituted by law within that section; thirdly, that this particular partnership was not a bonâ fide partnership, and had no object but that of winding up the firm of Allen & Co., Limited. As to the first point: In Ogilvie's Imperial Dictionary one of the meanings of the word "company" there given is, "a number of persons united for performing or carrying on anything jointly; as, a company of players; an insurance company; 'High in office in the Goldsmiths' Company:' Dickens. 'A company forges the wine:' Tennyson. (The word is applicable to private partnerships or to incorporated bodies; but where there are only a few individuals associated the concern is generally called a copartnery, the term 'company' being usually reserved for large associations)." Lindley, L.J., in his book on Partnership and Companies, 4th ed. p. 5, says: "The fundamental distinction between partnerships and unincorporated companies is that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who therefore are not at liberty without the consent of all to retire from the firm and substitute other persons in their places; whilst a company consists of a large number of individuals not necessarily acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not." We have looked carefully through the Act of 1862, and we cannot find any indication that the word "company" in s. 180 is used in any other sense than that indicated by Lindley, L.J. In s. 199 a partnership consisting of more than seven members, and not registered under the Act, is included under the term "unregistered company." By Tables B and C the same fee is charged for registering an existing company, except when there is an express exemption, as for registering a new company. It was also pointed out to us that the legislature itself has used "company" and "co-partnership" as synonymous terms both in 7 & 8 Vict. c. 113, s. 47, which is re-enacted by s. 205 of the Act of 1862, and also in 7 & 8 Vict. c. 110, s. 2, which is repealed by that Act. Sect. 180 fixes the

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number of members required to entitle a company to registration at not less than seven. The number of members of the partnership in this case is seven, and any partner may transfer his shares without the consent of the company. It is clear, therefore, that this partnership is a company within the description given by Lindley, L.J., and we are also of opinion that it is a company within the meaning of s. 180. But, secondly, it is said that, if it is a company, at any rate it is not a company constituted by law. In order to determine the meaning of this expression we must read the whole sentence, which runs thus: "any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law." On the one hand it is said that "constituted by law" is intended to distinguish and exclude companies constituted by agreement of the parties. On the other hand, it is said that "constituted by law" means constituted according to law, and a passage in Lindley, L.J.'s book on Partnership was referred to (4th ed. p. 4), where it is said, "A corporation is a fictitious person created by special authority (and by the law of England, by the Crown, or by Parliament), and endowed by that authority, &c.," where the phrase "by the law of England" is equivalent to "according to the law of England." Further, it was pointed out that of the three kinds of companies specifically referred to in that section the first is a company formed in pursuance of an Act of Parliament; the second is a company formed in pursuance of letters patent (that is, by the Crown); and the third is a company formed by voluntary agreement, and that this embraces all the ways in which companies can be formed, although only one of the kind of companies which can be formed by voluntary agreement is indicated; so that the words "otherwise constituted by law" do not point to any fourth mode of forming companies, but must refer to other companies formed by voluntary agreement, which are not engaged in working mines within and subject to the jurisdiction of the Stannaries. That a cost-book mining company is formed by agreement is expressly stated by Lindley, L.J., on Partnership, 4th ed. p. 149, and was not denied by

the other side. What then is the meaning of "otherwise constituted by law"? It was contended that these words simply exclude companies not formed according to law; as, for instance, banking companies of over ten persons, or other trading companies of over twenty persons, and also all companies which are illegal, whether they are so by the common law or are made so by some statute, of both of which classes Lindley, L.J., gives numerous specimens: Lindley on Partnership, 4th ed. p. 180, et seq. Moreover, it was urged that this view was supported by s. 183, which requires that before registration there shall be delivered to the Registrar a copy of any Act of Parliament, Royal Charter, letters patent, deed of settlement, contract of copartnery, cost-book regulations, or other instruments constituting or regulating the company; and it was pointed out that the words "deed of settlement" and "contracts of co-partnery" appeared only applicable to companies formed by voluntary agreement which are not cost-book mine companies. To these considerations must be added the remarkable fact that for twenty-seven years after the Act was passed it never seems to have occurred to anybody that ordinary partnerships of seven or more members could not register under it, and a long list of companies has been cited to us which, although ordinary partnerships, have been allowed to register themselves under s. 180. We asked the Attorney General to point out what inconvenience would result from allowing existing partnerships to register under s. 180, and all he could say on that subject was that, if it were done, the Crown would lose certain fees on the transfer of the partnership property to the company, which, if the partnership can be registered, is transferred at once by the statute itself to the registered company, whereas if a new company has to be formed to take over the business of the old partnership, fees must be paid to the Crown on the transfer of the property of the old partnership to the new company. This does not appear to us a sufficiently good reason for departing from a construction of the section which is reasonable in itself, and has the sanction of twenty-seven years' usage; and consequently we hold that the contention of the prosecution on this point is correct. The third point which was raised by Mr. Ingle Joyce was of a much

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narrower kind. It was urged that this particular company was not a bonâ fide company; that it had no business, and was simply formed for the purpose of winding up the company of Allen & Co. It would rather seem that the partnership in question is formed for the purpose of winding up itself, and it was pointed out by Mr. Theobald that by s. 180 the registration is not to be invalid by reason that it has taken place with a view to the company being wound up. We see no reason to think this was a bogus company; and we are therefore of opinion that this third objection fails like the others, and that the rule must be made absolute.

Rule absolute.

W. A.

From this judgment the Registrar of Joint Stock Companies appealed.

1891. July 28. Sir *R. E. Webster, A.G., Ingle Joyce,* and *H. Sutton,* for the appellant. The question turns mainly upon the construction of the 180th section of the Companies Act, 1862, under which it is proposed to register this partnership. In the first place, this partnership cannot be regarded as a company at all. A partnership is composed of persons bound together by mutual confidence, and their shares cannot be transferred without the consent of all the copartners. In a company there is no such relation between the members, and the shares can be transferred without the consent of the other members: Ogilvie's Imperial Dictionary, "Company"; Lindley on Partnership, 4th ed. p. 4. The Act does not contemplate the transformation of a private partnership into a joint stock company under Part VII. If that is desired, it must be done by the machinery provided by Part I., and the assets of the partnership must be transferred to the new company and the proper stamp duties paid. One of the objects of the applicant here is to escape those duties. Secondly, if this partnership is a company in any sense, it is not "duly constituted by law" within the meaning of s. 180. Those words must be taken to refer to companies constituted not by mere contract between the members, but by virtue of some

special legal authority. If the words refer only to companies which are not contrary to law, as the applicant contends, the previous reference to companies framed by Act of Parliament and Royal Charter would be surplusage. Thirdly, the company which was intended to be constituted by the deed of March 13, 1891, was not a bonâ fide company for carrying on business, but was simply formed for the purpose of being wound up under the winding-up Acts, and thereby defeating the rights of the creditors against the assets of the partnership in the Court of Bankruptcy. Whatever may be the construction of the 180th section, such a device as this is contrary to the whole policy of the Act.

[They also referred to ss. 179, 181, 183, 184, 188, and 193 of the Companies Act, 1862, and to 1 Vict. c. 73, s. 5; 7 & 8 Vict. c. 110, ss. 2, 3, 7 and 58; 19 & 20 Vict. c. 47, ss. 3, 107.]

Finlay, Q.C., *Buckley, Q.C.*, and *Theobald*, for the respondent. The association formed by the agreement of March, 1891, is a company in the proper sense of the term. "Company" is a general term which includes partnerships. In the edition of Ogilvie's Imperial Dictionary, published in 1876, under the word "Company," the passage quoted by Cave, J., in his judgment stands as follows: "The word is applicable to private partnerships or to incorporated bodies of men. Hence it may signify a firm, house, or partnership; or a corporation, as the East India Company, a banking or insurance company." In the 7 & 8 Vict. c. 110, s. 2, that Act is made to apply to every partnership consisting of more than twenty-five members. The Companies Act, 1862, is not a mere consolidation of former Acts; it applies to all partnerships. Sect. 181 shews that companies are contemplated which are not divided into shares. But supposing it is necessary that a company should be an association in which the shares are transferable at the will of the holder, that was the case in this company; for the deed of March, 1891, incorporated Table A of the Act of 1862, and consequently under art. 16 the shares were made so transferable. The company in the present case comes fairly within s. 180. The words "otherwise duly constituted by law" are applicable to it. Those words were intended to include all companies not

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previously mentioned, which might be constituted according to law, whether by mere consensual contract, as ordinary partnerships, or otherwise. There is nothing to limit their operation, as contended by the appellant, to companies formed under legislative authority. According to that construction, the words would be useless, for all companies formed under Acts of Parliament had been mentioned in the previous clause of the section. It would be a great omission in the Act if an ordinary partnership, consisting of more than seven and less than twenty members, with transferable shares, could not be registered as a joint stock company under Part VII. There is nothing against public policy in the registration of such a company as this. Companies are constantly registered for the purpose of being wound up, and that object is specially recognised by s. 180. In the present case there is no intention to interfere with the rights of creditors, and the great majority of creditors support the application.

Sir R. E. Webster, A.G., in reply.

LINDLEY, L.J. This is a very ingenious attempt to evade the Act of Parliament, but I do not think the attempt is successful. The facts of the case are simple enough. There were seven partners carrying on business as booksellers and publishers under the name of Allen & Co. They had sold the whole of their business to a limited company called Allen & Co., Limited. They were partners, therefore, only in the sense that they had not formally dissolved partnership, and they had to meet their liabilities. They were not carrying on any business, and they did not propose to carry on any business, except, of course, to wind up their old affairs. Under those circumstances they desire to avail themselves, if they can, of Part VII. of the Companies Act, 1862, and in some way or other to get registered under that Act with a view to wind up under it. For that purpose they execute this ingenious document of March 13, 1891, which recites that they did carry on business as I have stated, and that they had sold their business to this limited company, and that the shares in that limited company, which was the price of their business, are now the only assets of the partnership. That means, of course, joint assets; separate assets

are not contemplated in the deed. Then it proceeds: "And whereas the partners are desirous of defining the terms of their existing copartnership with the modifications hereinafter appearing with a view to the registration of such copartnership as an unlimited company under Part. VII. of the Companies Act, 1862." That is their whole object. It is the whole object of this deed, as appears upon the face of it. Then it goes on to say that each of the partners covenants "with the other of them and with each of them that the partners and the several other persons (if any) who become members of the company hereby constituted shall, whilst holding shares in the capital of such company, be and continue until dissolved under the provisions hereinafter contained, a company under the name hereinafter specified, and that such company shall be subject to the regulations following;" then it says that the members shall be holders for the time being of shares in the capital of the company. "Until after the registration of the company there shall not at any time be more than twenty members," which is put in, of course, with reference to s. 4 of the Act. The registration of the company means registration under Part VII. of the Act. "The objects for which the company is established are to continue and carry on the copartnership hitherto existing between the partners"—which is deliberately untrue; it is nothing of the sort—"and to realize and get in the assets of the copartnership, and to satisfy its liabilities, and to do all such other things as are incidental or conducive to the attainment of the above objects. The capital of the above company shall be 770*l.* divided into seventy-seven shares of 10*l.* each. The said shares shall be divided among the partners as follows:" And then follows a table of the seven people with the shares opposite their names. Then it says, "The 20,000 shares of Allen & Co., Limited, shall be brought into the company by the partners," which means that in some way or other they are to be assets of the new company. "The number of directors of the new company shall not be more than seven nor less than three. The partners shall be the first directors of the company. The provisions contained in Table A in the First Schedule of the Companies Act, 1862," except some which I need not mention,

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which refer to converting shares into stock, "shall apply to the company as if they were set out at length." I do not think there is anything else which is material. One of the partners takes this to the Registrar of Joint Stock Companies and asks him to register it under Part VII. of the Act of 1862, and he declines. The applicant applies for a mandamus, and the Divisional Court has granted one upon the ground that the partners have brought themselves within the terms of s. 180, to which I will presently allude, and the appeal is from that decision.

Now, before we approach the language of s. 180, which I will do presently, it is necessary to allude to the general objects of the Companies Act, 1862, and the structure of the Act itself. The recital is this: "Whereas it is expedient that the laws relating to the incorporation, regulation, and winding-up of trading companies and other associations should be consolidated and amended;" then s. 4 contains this clause: "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries." The Act is divided into nine parts, the first of which relates to the constitution and incorporation of companies and associations under this Act. Then there are other parts relating to the distribution of capital, the management of the company, and the winding-up of companies, and the registration office; and Part VII. relates to companies authorized to register under this Act of Parliament. Then there is an 8th part, which relates to the application of the Act to unregistered companies. Now, that distribution of the Act is important, because it appears to me to be quite contrary to the whole scheme of the Act that a company should be formed solely for the purpose of registration under Part VII. The Act of Parliament is framed upon the theory that companies which

are to be formed for registration are to be formed and registered under Part I.; and Part VII., and the whole group of sections included in Part VII., are addressed to a totally different subject. Sect. 6 of the Act, which is in Part I., says this: "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability." That does appear to me, when taken in conjunction with the rest of the Act to which I have called attention, to involve a negative, that the company is not to be formed and registered under this Act except under Part I., and it appears to me it would be extremely difficult to work out the various provisions of this Act, which are very long and complicated, unless that leading idea was kept in mind. That is not the object of the applicant and his copartners. They do not desire to form a company under Part I. at all; but they desire to register the company formed by this document under Part VII., and they apply under s. 180. That section runs thus: "With the above exceptions"—which are specified in s. 179—"and subject to the foregoing regulations, every company existing at the time of the commencement of this Act, including any company registered under the said Joint Stock Companies Act, consisting of seven or more members"—the first part of the section, of course, does not apply to this, and the applicant says that it comes under the clause I am now about to read. "And any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries"—none of those are applicable to this particular company—"or being otherwise duly constituted by law and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up."

Now, in order to bring this within s. 180, it must be established that we are dealing with a company, whatever that may mean,

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and a company duly constituted by law. Now, let us examine to what extent and in what sense this is a company, and to what extent and in what sense it is duly constituted by law. At first, I confess, until I had Mr. Buckley's assistance, I did not see that this could be called a company at all. I understand by a company—an unincorporated company—some association of members the shares of which are transferable. As distinguished from a partnership, I know of nothing else except the transferability of shares. A company generally consists, of course, of more than a few people. This company is to consist of the seven persons who are named here and of such other persons as may be joined; but I could not discover, until it was pointed out, that there was any provision here for transferability of shares. However, it appears to be possible to make out that there is such a provision by reason of clause 11, which says that the provisions contained in Table A in the First Schedule to the Companies Act, 1862, shall apply to the company as if they were set out at length. There is a difficulty in giving full effect to clause 11, because if you do set the provisions out at length nine-tenths will not be applicable to this company when it is registered. Mr. Buckley's answer to that is: "Well, but the remaining tenth will be applicable, and amongst those which are applicable is article 16, which renders the shares in it transferable." I will assume that this is a company, or may be a company, of some sort or kind. Sect. 180 does not say for what purpose a company to be registered under this Part VII. is to be formed. It says: "Every company existing at the commencement of the Act, and any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law." The argument is, that as this is a company, it is within s. 180, because it is brought within the expression, "duly constituted by law," by reason of there being no law against it. I am not prepared to say that there may not possibly be cases—I do not know that there are—but I will not go so far as to negative the possibility of a company being formed after 1862 of less than twenty members with transferable shares which might possibly

be registered under s. 180. But assuming that a company of less than twenty members can be formed with transferable shares, by mere agreement after the passing of the Act, for the purpose of carrying on business, and that afterwards the members find it desirable to register under Part VII., and, assuming that this can be done, it does not follow that what is sought to be done in this case can be done. To carry this case we must say that a company is duly constituted by law which is formed by agreement simply for the purpose of being registered under Part VII. I cannot think that is the true construction of the Act of Parliament. Assuming that "duly constituted by law" means as much as I have suggested, I can find nothing in this Act of Parliament which warrants this idea, that a company can be formed for registration under Part VII., and, as I said at the beginning, if you look at Part VII. it is addressed, not to the registration of companies formed for the purpose of registration, but to the registration of companies formed for carrying on business, and the winding-up of which, or the registration of which, appears to be desirable. That is the kind of case to which the whole group of sections in Part VII. is applicable, and it appears to me to be a misconstruction of the Act of Parliament and a misuse of it, to form any company, I do not care what it is, simply for the purpose of registration under Part VII.

On these grounds this mandamus must be discharged and the appeal must be allowed.

FRY, L.J. I find myself unable to agree with the conclusion of the learned judges in the Court below, and I take the same view of the rights of the parties as has been expressed by the Lord Justice. The question mainly turns upon the true meaning of s. 180, which is part of Part VII. of the Act relating to companies authorized to register under the Act. It appears to me that the real question turns upon these words "or being otherwise duly constituted by law," and what is the true meaning to be placed upon these words—whether they do or do not include the entity constituted by the agreement of March 13, 1891, in this case. The section begins with certain exceptions, to which I need not refer, and then it provides for "every

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company existing at the time of the commencement of this Act, including any company registered under the Companies Acts, consisting of seven or more members, and any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the Stannaries, or being otherwise duly constituted by law." Now, with regard to the general meaning of those words I shall only express what is the inclination of my opinion upon them. I am not prepared to hold that these words do include a mere private partnership the shares in which are transferable without the consent of all the partners. I am inclined to think that the true meaning of these words is confined to a company which is constituted in some manner analogous to those with which this section begins, namely, constituted by registration under some Act of Parliament, or in pursuance of an Act of Parliament, or under letters patent. I am inclined to think it must be some constitution ejusdem generis with those—that those words refer to cases in which the constitution of the company does not arise merely from the consensual agreement of the parties, but in which that constitution is either determined or modified, or affected in some way by something other than mere consent—by something which the law imposes —something, I say, like an Act of Parliament or letters patent; and that the probable reason for introducing these words is that the legislature contemplated that other modes of constituting companies might come into existence besides the modes then known. Indeed an illustration of that very fact has occurred, for a new mode of constituting companies by certificate has arisen since the Act of 1862 was passed. That is the inclination of my opinion with regard to the meaning of these words. But even if they have a larger significance, I am clearly of opinion that they are subject to one exception which is enough to determine this case; and that exception is this, that where a body is constituted merely for the purpose of obtaining incorporation of a company under the Act of 1862 it is not a company "duly constituted by law" within the meaning of these words.

I arrive at that conclusion for the same reasons which have been given by the Lord Justice. I turn to Part I., and I find

that that deals with the registration and incorporation of companies and associations under this Act, and I find a particular mode in which seven persons may come together for the purpose of incorporation under the Act. Then s. 6 provides that any seven or more persons associated for any lawful purpose may (and I omit certain words) form an incorporated company with or without limited liability, and then the words which I have omitted define the mode in which they may do it. They may do it by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration. Now, I take that to imply a negative; I take it to imply this, that if they desire to form an incorporated company under the Act, they must do it in the method there prescribed, and consequently that they cannot lawfully in any other way enter into a combination or association or company for the mere purpose of obtaining incorporation as a company under the Act. I have said "mere purpose" of obtaining incorporation, and I think that is a true description of this instrument, because, reading the instrument with the knowledge we have of the surrounding circumstances, it is impossible not to see that the primary object—I may say, the only object—which the parties had in view was obtaining the registration of the association as a company under the Act, and that all the other provisions which are introduced in the document of March 13 are merely ancillary to that object. I think, therefore, that it plainly is not within the 180th section.

LOPES, L.J. I agree with what has been already said, and in a very few words I will give my reasons. Assuming that this is a company, the question arises under the 180th section of the Act of 1862, as to whether it is a company duly constituted by law. It seems to me it is only necessary to consider the true nature of this alleged company in order to answer that question, and to answer it in the negative. What is the true nature of this arrangement for a company? It is an arrangement to form a company out of a private partnership in order to enable it to be registered, be it observed evading all the salutary provisions of Part I. of the Act as to the formation of companies. That being so, I am clearly

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of opinion that this cannot be said to be a company "duly constituted by law" within the 180th section. It is not necessary to decide what the meaning of the words "duly constituted by law" is; but if it had been necessary to define those words I entirely agree with the view that has been enunciated by my brother Fry. I am inclined to think that the true meaning of those words is this, that they refer to companies constituted by the intervention of the legislature or other tribunal competent to constitute companies, and do not refer to consensual contracts such as the present.

I am clearly of opinion, therefore, that the Divisional Court were wrong in granting this mandamus.

Appeal allowed.

Solicitor for appellant: *The Solicitor for the Board of Trade.*
Solicitors for respondents: *Linklater & Co.*

M. W.

C. A.
June 5.

[IN THE COURT OF APPEAL.]

TOMKINSON *v.* BALKIS CONSOLIDATED COMPANY.

Estoppel—Company—Share Certificate—Damages.

A share certificate, issued by a company under their corporate seal, stating that the person named in it is the owner of a specified number of shares in the company, estops the company from afterwards denying his title to the shares; and, if the company are unable to give him the shares, they are liable in damages by reason of their statement.

Semble, that in such a case an action against the company for damages can be maintained either by the person named in the certificate or by a purchaser from him.

Bishop v. *Balkis Consolidated Co.* (25 Q. B. D. 512) distinguished.

Derry v. *Peek* (14 App. Cas. 337) explained.

APPEAL by the defendants against the judgment of Pollock, B., for the plaintiffs at the trial of the action without a jury.

At the trial it appeared that the plaintiffs were stockbrokers in the city of London. In December, 1888, they advanced 250*l.* by way of loan to one Powter, he depositing with them as security a blank transfer of 1000 shares in the defendant company, numbered from 386,667 to 387,666 inclusive. The transfer was not dated, and it was not filled up with the name of any transferee.

The numbers of the shares were indorsed on it, and it bore on it a "certification," signed by the secretary of the company, stating that the original certificate of the shares had been deposited with the company. In May, 1889, the plaintiff Tomkinson filled up the transfer with his own name, as representing his firm, and executed it (it bore date February 13, 1889); and on his application the company, on July 1, 1889, issued a certificate, signed by two of the directors, countersigned by the secretary, and sealed with the seal of the company, stating that the plaintiff Tomkinson was the proprietor of the 1000 shares. The certificate was sent to the plaintiff on July 9. The plaintiff was never in fact registered in the company's books as the owner of the shares. There was a running account between the plaintiffs and Powter, and in August, 1889, there was due to them from him a sum of 193*l.* 14*s.* 6*d.* on the security of the 1000 shares, and he instructed them to sell the shares for the purpose of paying the debt. The plaintiffs accordingly entered into four contracts with four different purchasers for the sale of the shares for sums which amounted altogether to 426*l.* 17*s.* 6*d.* On August 29, the plaintiffs sent to the company's office the certificate of the shares, together with the transfers to the purchasers, in order that the transfers might be indorsed with a "certification" by the company's secretary. This was done, and the transfers with the "certification" upon them were returned to the plaintiffs, and were then handed over by them to the respective purchasers, who thereupon respectively paid their purchase-moneys to the plaintiffs. Out of the 426*l.* 17*s.* 6*d.* thus received the plaintiffs retained the 193*l.* 14*s.* 6*d.* which was due to them on the security, paid 110*l.* to Powter, and retained the balance of 123*l.* 3*s.*, claiming a lien upon it in respect of some other debts due to them by Powter. After this the company refused to register the transfers to the purchasers; and it then appeared that in January, 1889, Powter had transferred the same 1000 shares to Messrs. Maitland & Balfour, who on January 14, 1889, were registered by the company as the owners of the shares, and a certificate was issued to them by the company accordingly. The plaintiffs, in order to complete the contracts with their purchasers, were compelled to buy 1000 other shares in the market;

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and, as the price had risen, they had to pay 717*l.* 10*s.* for the shares. The whole of the company's shares had been issued, so that they could not give the plaintiffs any shares in place of those which Powter had professed to transfer to them.

By this action the plaintiffs claimed from the company 717*l.* 10*s.* and interest, or, in the alternative, damages.

The learned judge held that the company were estopped by the issue of the certificate to the plaintiffs from denying that they were the owners of the shares. He was of opinion that the case was governed by *In re Bahia and San Francisco Ry. Co.* (1) And he held that the 717*l.* 10*s.* which the plaintiffs had paid was the true measure of the damages.

Finlay, Q.C., Buckley, Q.C., and *H. Sutton,* for the defendants. The plaintiffs did not advance their money on the faith of any representation made by the company by means of the certificate; the certificate was not issued till long after the advance was made. At that time there was only a "certification," which did not create any estoppel against the company: *Bishop* v. *Balkis Consolidated Co.* (2). The purchasers from the plaintiffs paid their purchase-money only on the faith of "certificated" transfers. No case of estoppel, therefore, arises as against the company. At any rate, the plaintiffs can only recover damages to the extent of their own interest in the shares, i.e., their interest as mortgagees. They were not the absolute owners of the shares, and for any surplus beyond what was due to them on their security they were trustees for Powter, and Powter, having committed a fraud, could not have sued the company himself. The 110*l.* and the 123*l.* ought both to be deducted from the 717*l.* 10*s.* *Bishop* v. *Balkis Consolidated Co.* (2) is in point. The plaintiffs rely upon *In re Bahia and San Francisco Ry. Co.* (1) But there the claim against the company was made by a transferee of shares who had paid his money on the faith of a certificate issued by the company to his transferor. In the present case the claim is made by the transferor, who has not acted on the faith of the certificate. The doctrine of estoppel is not touched by the recent decision of the House of Lords in *Derry* v. *Peek* (3); but

(1) Law Rep. 3 Q. B. 584. (2) 25 Q. B. D. 512. (3) 14 App. Cas. 337.

it shews that there is no liability for a misrepresentation which is not made fraudulently.

[KAY, L.J., referred to *Piggott* v. *Stratton* (1); *Freeman* v. *Cooke* (2); *Burkinshaw* v. *Nicolls.* (3)]

For the purpose of estoppel it is no doubt sufficient that a statement is made with the intention that it should be acted upon by the person to whom it is made, and that it is acted on by him. The person who states the particular fact is then prevented from afterwards denying the existence of that fact. In the present case the certificate was obtained by the plaintiffs' lodging with the company a fraudulent document—a transfer which was in effect a forgery. There is no authority for saying that a share certificate creates an estoppel as between a transferor of the shares and the company: *Simm* v. *Anglo-American Telegraph Co.* (4) The certificate is not a representation made by the company to the transferor; it is given to him, not that he may rely on it himself, but that he may shew it to a purchaser from him.

The company's capital having been all issued, they cannot be made responsible by way of estoppel for shares which they could not have given by way of contract: *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (5)

Reid, Q.C., and *F. W. Hollams* for the plaintiffs. As to the damages, the question is, how much are the plaintiffs out of pocket by reason of the refusal of the defendants to give them the shares to which they cannot deny that the plaintiffs are entitled: *In re Bahia and San Francisco Ry. Co.* (6) The plaintiffs dealt with the 426*l.* 17*s.* 6*d.* in the proper way—in the way in which they were legally entitled to deal with it. There was no misapplication of it as between themselves and Powter.

As to the liability of the defendants—It is said that, because all their capital had been issued, the company cannot be estopped from denying the plaintiffs' title, inasmuch as they have no shares which they can give the defendants. But there is no question of over issue of capital. If this argument is well

(1) 1 D. F. & J. 33.
(2) 2 Ex. 654.
(3) 3 App. Cas. 1004.
(4) 5 Q. B. D. 188.
(5) 18 Q. B. D. 714.
(6) Law Rep. 3 Q. B. 584.

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founded, a company would be entirely absolved from estoppel as regards shares which have been properly issued.

It is said that the plaintiffs were not induced to advance their money by the certificate, but by the prior "certification," and therefore the company are not liable. That argument comes to this, that the company are not liable because they made a prior false statement, though they would have been liable if they had not.

Then it is said that the certificate creates an estoppel in favour of the purchaser of the shares, but not in favour of the vendor. But the certificate is given to the vendor, and it states that he is the owner of the shares. It must be given to him with the intention that he shall make use of it. In Stock Exchange transactions the buyer of shares never in fact sees the certificate; he only sees the "certification." In *In re Bahia and San Francisco Ry. Co.* (1), Cockburn, C.J., said (at p. 594): "This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once shewing a marketable title, and the effect of this facility is to make the shares of greater value."

Buckley, Q.C., in reply.

LORD ESHER, M.R. The plaintiff brings this action to recover damages for the refusal of the defendant company to register his transferees, who had bought from him in the market 1000 shares in the company, by reason of which refusal he has been compelled to buy other shares to deliver to his transferees in fulfilment of his contract, instead of the 1000 shares which, as he alleges, the company had led him to believe that he could transfer. The company say that he did not transfer any shares—that he had none to transfer. His answer is, that the company are estopped from saying that to him, because they gave him a certificate of the 1000 shares, with the intention that he should use it in the market, and in order to enable him to sell the shares. He says that the certificate was given to him for that purpose and no other, and that it amounts to a representation by the company

(1) Law Rep. 3 Q. B. 584.

that he is the owner of the shares, and is entitled to deal with them, and the sole object of it is to enable the person to whom it is given to sell the shares. That this is the real object of a share certificate is clearly stated by Cockburn, C.J., in *In re Bahia and San Francisco Ry. Co.* (1) The effect of that, which is called a "certification," which is another step in these Stock Exchange transactions, was not very well understood until the decision of this Court was given in *Bishop* v. *Balkis Consolidated Co.* (2) There, after full consideration, this Court came to the conclusion that a "certification" has not the same effect as a certificate; but the effect of the certificate remained what it had been described to be by Cockburn, C.J. The plaintiff, therefore, says that the defendants are estopped in this action from denying his title to the 1000 shares, and that the estoppel arises in this way. It is said that the case falls within this definition, which I gave in Law Rep. 10 C. P. at p. 317: "If a man either by express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts." It is said that the defendant company have by the certificate made a representation to the plaintiff of the existence of a certain state of facts which would entitle him to be registered as the owner of the shares, and to deal with them as owner, and that the certificate was given to him with the intention that it should be acted upon by him, if he should choose to sell the shares in the market. The plaintiff did wish to sell his shares in the market, and he did sell them, and therefore he acted upon the certificate in the way in which the company intended that it should be acted upon, and in the belief of the existence of the state of facts represented by it to exist. He made use of the certificate in the ordinary way in the market, in the very way in which the company intended him to use it—that is, in selling the shares. His case is that the company gave him the certificate for the purpose of his producing it in the market if he should sell the shares. He did

(1) Law Rep. 3 Q. B. at p. 594. (2) 25 Q. B. D. 512.

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sell the shares, and he produced the certificate in the market, and the result was that he bound himself to the purchasers of the shares. They bought from him, and he sold to them, because the company had given him this certificate. Then, when he had sold the shares, the company refused to register the purchasers as transferees, and the plaintiff says that the company are wrong in so doing, and that they are liable to make good the loss which has resulted to him from their refusal. The purchasers had not bought any particular shares; but he was bound to give them that number of shares which they had bought, and in order to give them those shares he was obliged to buy other shares, for which he had to pay 717*l.* 10*s.*, and he claims that sum as damages from the defendants. I am of opinion that these facts bring the case within the definition. If the plaintiff had kept the 426*l.* 17*s.* 6*d.*, which he received from the purchasers, in his pocket, I think he would not have been entitled to the whole £717 10*s.* He would have been bound to bring into account the money which he had received in the nature of salvage to diminish the damages. But he had not got that money, because he had dealt with it in the way in which he was legally entitled to deal with it, so that it could not be properly said that he was keeping it in his pocket. Under these circumstances, it seems to me that the whole 717*l.* 10*s.* is the proper measure of the damages. As to the authorities which have been cited, *In re Bahia and San Francisco Ry. Co.* (1), to which I have already referred, is material as to the effect and meaning of a share certificate, which is very different from a certification. *Simm* v. *Anglo-American Telegraph Co.* (2) has no bearing on the present case, and *Derry* v. *Peek* (3) has nothing whatever to do with the doctrine of estoppel. To my mind, the decision of the latter case turned on as simple a point of law as possible, viz, that in order to maintain an action for the effect of a misrepresentation, you must shew that it was a fraudulent misrepresentation. It has been argued that in a Court of Equity it is immaterial whether the representation was fraudulent or not—that it was enough that it was untrue. I think that in the Court of Appeal we came to the conclusion

(1) Law Rep. 3 Q. B. 584. (2) 5 Q. B. D. 188.
(3) 14 App. Cas. 337.

that that might be so when an action was brought for the specific performance of an agreement, but that it was not so when an action was brought to recover damages for a misrepresentation. If an action is brought in respect of a misrepresentation in order to recover damages, the plaintiff must prove that it was a fraudulent misrepresentation; there neither was nor is any difference in this respect between a Court of Equity and a Court of Common Law. But in equity, if the specific performance of a contract was sought, it might be an answer to the applicant for specific performance to shew that the contract had been obtained by a misrepresentation, even if it was not fraudulent. In *Derry* v. *Peek* (1) the House of Lords were not dealing with the question of specific performance—it was not before them. They said that, if you bring an action for misrepresentation, you cannot sustain it by proving a misrepresentation which was not fraudulent. That is all which the House of Lords decided; and how it could be supposed that that decision had altered the law I have never been able to understand. But, however that may be, *Derry* v. *Peek* (1) has nothing to do with the present case, which is founded on the settled doctrine of estoppel—a doctrine which has been recognised for years—and we cannot overrule it. I am clearly of opinion that the learned judge was right in the judgment which he gave, and therefore the appeal must be dismissed.

LOPES, L.J. I desire only to add that I think the effect of a share certificate is as well stated as it could be by Cockburn, C.J., in *In re Bahia and San Francisco Ry. Co.* (2), and, that being the effect of it, it seems to me perfectly clear that the certificate created an estoppel against the company in the present case.

Whether such an action can be maintained by the transferor as well as by the transferee of shares it is unnecessary now to determine, because we have been told that all necessary amendments are to be taken as having been made in the present case. But I am inclined to think that the action could be maintained by the transferor for the refusal to register his transferee.

With regard to the damages, the plaintiff claims the sum of

(1) 14 App. Cas. 337. (2) Law Rep. 3 Q. B. at p. 594.

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717*l.* 10*s.*, that being the amount which he had to pay in order to replace the shares by purchasing others in the market. Is he entitled to recover the whole of that amount? I think he is. It is said that the purchase-money of the shares which he sold, and which realized 426*l.* 17*s.* 6*d.*, ought to be deducted. I think he was entitled to apply the whole of it in the way in which he did, and, that being so, I think the matter stands just as if that money had never come to his hands, and he is entitled to recover from the defendants the whole of the 717*l.* 10*s.* which he has had to pay for the shares. I agree entirely with the judgment of Pollock, B.

KAY, L.J. This case involves some very important questions, and I should like to express my opinion in a few words of my own.

The facts, as I understand them, are these. One Powter, who was a shareholder in the Balkis Company, in December, 1888, deposited a blank transfer of 1000 shares with the plaintiff, as security for the balance of the current account between Powter and the plaintiff, and that transfer bore upon it what is called a "certification," which, I believe, was this: a statement, signed by an officer of the company, that share certificates had been produced to the company, shewing that Powter was justified in transferring the shares. The blank transfer was afterwards completed, and it was executed in May, 1889, though it was dated February 13, 1889. In August, 1889, Powter sent instructions to the plaintiff to sell the shares. The plaintiff had in the meantime armed himself with a certificate of the shares, under the seal of the company, which he had obtained from the company. It was dated July 1, and was received by the plaintiff on July 9, and it was obtained from the company upon the plaintiff's application. The certificate, of course, amounted to a statement to the plaintiff by the company, under the company's seal and signed by two of the directors, that the plaintiff was the owner of the shares. The plaintiff had never been registered as owner. He was a stockbroker, and this appears to have been known to all the parties, and the only object of obtaining such a certificate was to enable him to sell the shares. A man who holds

shares as an investment, and who does not intend to part with them, very often does not get a certificate at all. But when a man, especially a man who is a stockbroker, obtains a certificate of shares, the plain inference is that he does so for the purpose of selling them. I think, therefore, it must be taken that the certificate was given to the plaintiff by the company with the intention that he should act upon it by selling the shares. He did so act upon it, and he sold the whole of the 1000 shares to different persons in different lots. He then forwarded the certificate to the company, with the transfers by him to the various purchasers, and the result was, that after awhile the company repudiated the transfers, and refused to register the transferees. Now, if the certificate was issued by the company to the plaintiff for the purpose of enabling him to sell the shares, and he acted upon it by selling the shares, it seems to me that there is as clear a case of estoppel as can possibly be raised. I will quote the following words of Lord Blackburn, in *Burkinshaw* v. *Nicolls* (1): "When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel in pais or homologation. But, whether the term be used in its more or less technical sense, I take it that one common idea runs through the whole, namely, that your rights, as between yourselves, must be regulated upon the basis that that is accurate which you induced the other side to take as the basis upon which he was to act." I had felt one difficulty during the argument; but it has now been completely removed. My difficulty was this: the action is brought simply for damages against the company, but the statement of claim alleges as the ground of action that the company refused to register the plaintiff's transferees. I had, I confess, some doubt whether the plaintiff was justified in bringing the action

(1) 3 App. Cas. 1004, at p. 1026.

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in that form. But this is not very material, because, in the first place, that defence has not been raised, and, in the second place, if it had, we have been told that all amendments necessary to raise the real question between the parties are to be treated as having been made. I am quite clear that the plaintiff would be perfectly justified in bringing an action against the company on the ground that, if they did not accept his transfers, at any rate they were bound to register the plaintiff himself as owner of the shares; and, if they refused to register his name, he would be entitled to recover damages from them if they were estopped from denying that he was the real owner of the shares. I will not say that the action is not brought in the proper form, because my learned brethren, who have had much more experience in these matters than I have had, seem to think that the action will lie in the form in which it is brought. But I am satisfied that an action might be brought in a form in which the estoppel being relied on would entirely destroy the defence. The defence is simply this: The plaintiff was not the owner of these shares. That is an obvious denial of the statement which the company have made in the certificate, and the answer to it is, "Even if I were not the owner, you, the company, have by your certificate estopped yourselves from making that statement as against me," and, therefore, the conventional state of facts (to use Lord Blackburn's expression) must determine the action between the parties, whatever the real state of facts was. Therefore, I am satisfied that, either in this action, or in such an action as I have suggested alternatively, the estoppel would completely destroy the defence of the company, viz., that the plaintiff was not the owner of the shares, and therefore could not transfer them.

As to the other question, viz., whether the damages have been properly estimated, I am clear that they have. The shares were sold for 426*l.* 17*s.* 6*d.*, and that sum was received by the plaintiff. He applied it, as it was his duty to do, in payment of the debt due to himself from Powter, for which he held the shares as security. So far it was his duty thus to apply the money. He handed 110*l.* to Powter. That it was also his duty to do, when his own debt was satisfied. He kept 123*l.* in hand, obviously because there

was a current account between himself and Powter, and upon that sum he claimed a lien, and he has applied it in satisfying other liabilities from Powter to himself. Therefore, as between himself and Powter, it cannot be denied that he has applied every farthing of the money in the way in which he was justified in applying it, and the result is that he has parted with it all. It has gone in payment of Powter's debts, or into Powter's own pocket, and it is the same thing as if by Powter's direction the plaintiff had paid the whole of the money to a third person, to whom Powter was indebted, and then, when the plaintiff claims these damages against the company, he has not, in the view of a Court of law, and never had, in his possession anything which the company is entitled to set off against the damages. The attempt to lessen the damages, in my opinion, entirely fails, and the plaintiff is entitled to the whole of the 717*l.* 10*s.*, which he was compelled, by reason of the company's repudiation of their statement to him, to pay to those persons from whom he bought shares in order to fulfil his contracts with his purchasers.

For these reasons, I think that the judgment of the learned Judge was clearly right, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Stretton, Hilliard & Co.; Hollams, Son & Co.*

W. L. C.

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June 22, 23, *July* 30.

[IN THE COURT OF APPEAL.]

HICK *v.* RODOCANACHI AND OTHERS.

Ship—Bill of Lading—Demurrage—Wrongful Detention by Delay in unloading Cargo—Reasonable Time—Delay not caused by Default of Defendant—Strike of Dock Labourers.

In an action by the plaintiff, the shipowner, against the consignees of the cargo for delay in unloading the ship it appeared that the defendants were consignees under a bill of lading which imposed no express limit of time within which the goods were to be unloaded, but contained a stipulation that the goods were to be applied for within twenty-four hours after the ship's arrival, otherwise the master of the ship might himself unload at the expense of the consignees, and should have a lien on the goods for all freight and expenses. The ship arrived in the port of discharge, and the defendants duly applied for the goods and commenced to unload them; but a strike of the dock labourers occurred, and the unloading was delayed for about a month, and was then completed by the defendants. Both plaintiff and defendants did all they could under the circumstances to expedite the unloading of the ship:—

Held, that the bill of lading containing no stipulation as to the time within which the cargo was to be discharged, the defendants were entitled to a reasonable time, and that in the absence of any special provision on the subject the reasonableness of the time for unloading must be considered with reference to the circumstances which existed at the time of unloading; and that as the strike could not be attributed to any default on the part of the defendants, they were not liable for the delay.

APPEAL from a judgment of Mathew, J., on the trial of an action to recover demurrage and damages for the detention of the ship *Derwentdale* under the following circumstances:—

The plaintiff was the owner of the ship which was chartered by the defendants, Rodocanachi & Co., under a charterparty drawn in the form known as "The Azoff Charterparty of 1868," to bring home a cargo of grain from a port in the Sea of Azoff to the port of London. Under the terms of the charterparty freight was to be paid on the unloading and delivery of the cargo. Twelve running days (Sundays excepted) were allowed for loading, but only six days for unloading, and ten days on demurrage over and above the lay days at 4*d.* per ton on the registered tonnage per running day. The charterparty contained a stipulation that "the 1885 bill of lading is to be used under this charter, and its conditions to form part thereof." It was further provided that

"the freighters' liability on this charter is to cease when the cargo is shipped, provided the cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge; the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, and lighterage at port of discharge, and average."

The other defendants, Messrs. Raymond & Reid, were consignees of the greater part of the cargo. The bills of lading were in the form known as "The General Produce, Mediterranean, Black Sea, and Baltic Steamer Bill of Lading, 1885." They contained no reference to the charterparty, and no express limit of time within which the cargo was to be unloaded. They contained the following provisions on which one of the questions in the action turned: "The goods are to be applied for within twenty-four hours of ship's arrival and reporting at the Custom House, otherwise the master or agent is to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods . . . . The master or agent shall have a lien on the goods for freight and payments made (if any) or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods."

The ship arrived at Millwall on August 14, 1889, and Messrs. Raymond & Reid, the consignees, duly demanded delivery of the cargo. On the 16th they sent barges to receive the cargo, and on that and the two following days the unloading proceeded with due despatch. On the 20th the dock labourers struck, and refused to work; on the 23rd the lightermen struck; on the 26th the strike became general, and it lasted till September 16. After that date the unloading proceeded with all due despatch. Notwithstanding the strike, the ship's crew were able and willing to do such part of the unloading as had to be performed by the shipowners, and it was found to the satisfaction of the Court that the plaintiff was in no default. It was also established that the defendants did all that they could under the circumstances. The unloading of Messrs. Raymond & Reid's goods was completed on September 18. It therefore appeared that the days on which the cargo was unloaded by the defendants Raymond & Reid were three days before the

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strike and three days after the strike; the strike having delayed the unloading about a month.

The action was brought by the shipowners against Rodocanachi & Co., the charterers, and Raymond & Reid, the consignees, claiming demurrage and damages for detention of the ship.

At the trial of the action the jury were discharged by consent, and the case left to the decision of the judge. The learned judge held, that under the terms of the charterparty the liability of Rodocanachi & Co., the charterers, was at an end when the cargo arrived at the port of destination, and he therefore dismissed the action as against them with costs. With respect to Raymond & Reid, the consignees, the learned judge held that they had undertaken to unload the ship within a reasonable time, and that they had failed to discharge that obligation; and gave judgment against them for the amount claimed for demurrage and detention of the ship.

The defendants, Raymond & Reid, appealed from this judgment.

Sir R. Webster, A.G., Bucknill, Q.C., and *Leck,* for the appellants. First, the cargo was discharged within a reasonable time, for the expression "reasonable time" must be construed to mean a time which is reasonable having regard to the circumstances existing at the time when the discharge has to be effected. This rule is a fair deduction from the cases of *Budgett* v. *Binnington* (1); *Ford* v. *Cotesworth* (2); *Postlethwaite* v. *Freeland* (3); the decisions in which are founded on the older cases of *Paradine* v. *Jane* (4); *Taylor* v. *Great Northern Ry. Co.* (5); *Briddon* v. *Great Northern Ry. Co.* (6); *Porteus* v. *Watney.* (7) In this case, owing to a circumstance entirely beyond the appellants' control, namely, the strike at the docks, the cargo could not be unloaded sooner. Secondly, the bill of lading having provided that the respondent should be at liberty to discharge the cargo if the cargo owner did not take it out of the ship, he had a remedy in his own hands of which he neglected to avail himself.

(1) [1891] 1 Q. B. 35.
(2) Law Rep. 4 Q. B. 127; Law Rep. 5 Q. B. 544.
(3) 5 App. Cas. 599.
(4) Alleyne, 26, 27.
(5) Law Rep. 1 C. P. 385.
(6) 28 L. J. (Ex.) 51.
(7) 3 Q. B. D. 534.

[They also referred to *Thiis* v. *Byers*. (1)]

Barnes, Q.C., and *Robson*, for the respondent. There is an obligation on the part of the consignee to discharge the cargo within a reasonable time—that is to say, a fair, usual, and ordinary time; and for the purpose of ascertaining such time the shipowner is entitled to exclude incidents out of the ordinary course of events which delay the discharge of the cargo. The appellants must contend that they have only to do their best to discharge the cargo at the time when the ship arrives. But their obligation must be capable of definition at the time when it is made. There is no distinction in principle between cases respecting the loading and cases respecting the discharge of cargo; and a reasonable time must be taken to be a time which is reasonable under ordinary circumstances, and not a time which is reasonable in the circumstances which exist at the time of the discharge of the vessel: *Barker* v. *Hodgson* (2): *Adams* v. *Royal Mail Steam Packet Co.* (3); *Kearon* v. *Pearson* (4); *Rodgers* v. *Forresters* (5); *Burmester* v. *Hodgson* (6); *Hill* v. *Idle* (7); *Wright* v. *New Zealand Shipping Co., Limited.* (8) The bargain is made upon the footing that the shipowner shall have his ship ready for use again within the ordinary time. If the charterers wish to be protected from such incidents as strikes (which frequently happen, and may well have been within the contemplation of the parties), they should insert a special stipulation in the contract. All the cases down to *Ford* v. *Cotesworth* (9) treat the law as being thus; and in *Postlethwaite* v. *Freeland* (10), Lord Selborne, L.C., says: "There is no doubt that the duty of providing and making use of sufficient means for the discharge of cargo . . . . lies generally upon the charterer. If by the terms of the charterparty he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to

(1) 1 Q. B. D. 244.
(2) 3 M. & S. 267.
(3) 5 C. B. (N.S.) 492.
(4) 7 H. & N. 386.
(5) 2 Camp. 483.
(6) 2 Camp. 488.
(7) 4 Camp. 327.
(8) 4 Ex. D. 165, n.
(9) Law Rep. 4 Q. B. 447.
(10) 5 App. Cas. 599.

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be detained in his service beyond the time stipulated." It is reasonable that the risk of such an occurrence as a strike should fall upon the consignee rather than on the shipowner; for the consignee knows the condition of the labour market at the port of discharge, which the shipowner cannot be expected to do. It is always understood that the shipowner takes all risks of the voyage, and the merchant all risks of the port.

With respect to the second point, the power given to the master to unload the cargo himself was an additional remedy for the security of the shipowner, and was not intended to supersede his other remedies.

Bucknill, Q.C., in reply, cited *Raphael* v. *Pickford* (1); *Grant* v. *Coverdale* (2); *Tillett* v. *Cwm Avon Works.* (3)

LINDLEY, L.J. This is an action arising out of the strike at the London Docks in August and September, 1889. The plaintiff is a shipowner, and he has sued the defendants for their wrongful detention of his ship. The defendants, Rodocanachi & Co., are sued on the charterparty; but by a clause in it their liability ceased on their loading a full and proper cargo of sufficient value to cover freight, dead freight, and demurrage. This clause protected them, and judgment was given for them, and from that judgment there is no appeal. The other defendants, Raymond & Reid, are sued on the bills of lading as consignees of the cargo who have made default in unloading. Judgment has been given against them, and from that judgment they have appealed.

By the charterparty the plaintiff's ship was to go to the Sea of Azoff, there load a cargo of wheat, and bring that cargo to London. Freight was to be paid on unloading and delivery of the cargo. Twelve running days (Sundays excepted) were allowed for loading and unloading, but not more than six for unloading, and there was provision for ten days' demurrage over the lay days at 4*d.* per ton.

The bills of lading were in the form known as the "General Produce, Mediterranean, Black Sea, and Baltic Steamer Bill of

(1) 5 Man. & G. 551. (2) 9 App. Cas. 470.
(3) 2 Times. L. R. 675.

Lading, 1885." Bills of lading in this form contain no reference to the charterparty and contain no express limit of time within which the cargo is to be unloaded. They contain a clause or clauses which are relied upon as limiting the remedies of the shipowner as against the consignees of cargo even if they are in default in unloading.

The questions raised by the appeal are therefore two—viz., first, were the consignees in default in not unloading sooner than they did? and secondly, assuming that they were, do the clauses in question relieve them from liability to damages? In order to determine these questions it is necessary to refer to the terms of the bill of lading and to the events which happened. The bill of lading is in the ordinary form, and there are one or two clauses which I will read: "The goods are to be applied for within twenty-four hours of ship's arrival and reporting at the Custom House, otherwise the master or agent is to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods." Then: "The master or agent shall have a lien on the goods for freight and payments made, if any, or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods."

The events which happened were as follows: The ship arrived at Millwall on August 14, 1889, and the consignees duly demanded delivery of the cargo. On the 16th they sent barges to receive the cargo, and on that and the two following days the unloading proceeded with due despatch. On the 20th the dock labourers struck; on the 23rd the lightermen struck; on the 26th the strike became general, and it lasted until September 16. After that date the unloading proceeded with all due despatch. Notwithstanding the strike, the ship's crew were able and willing to do such part of the unloading as had to be performed by the shipowner, and it is to be taken as proved that the plaintiff was in no default. It is also established that the defendants did all they could under the circumstances, and that, unless they are liable for the consequences of the strike, they were also in no default. Returning now to the two questions raised by the appellants, it will be convenient to dispose of the second before considering the first, which is much the more difficult of the two.

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Assuming the consignees to be in default, it is contended by them that they are relieved from all obligation to pay damages occasioned by their default by reason of those clauses in the bill of lading which empower the master to put the cargo ashore at the risk of the owner, and which give the master a lien on the cargo for all money payable by its owner to the owners of the ship. But these clauses are obviously inserted in the interest and for the benefit of the shipowner, and they give him an additional remedy for the recovery of what is due to him, and not a remedy in substitution for any which he would have apart from these clauses. The master is under no obligation to land the goods and assert his lien instead of allowing the consignee to land them, and leaving him to be sued for the payments he ought to make. The master is empowered to do this, but he is under no obligation to exercise the power. He is the person to decide whether he will exercise it or not. Moreover, the right given to the master by the clause in question to land the goods is only conferred upon him in the event of the goods not being applied for within twenty-four hours of the ship's arrival and reporting at the Custom House; but in this case the goods were applied for in the stipulated time. The event, therefore, in which the master had a right to land the cargo under this clause never happened. Upon these grounds it is impossible to hold the defendants relieved from liability by the clauses in question.

This brings me to the first of the questions raised on the appeal—viz., the liability of the consignees for the delay caused by the strike. In order to determine this question it is necessary to ascertain exactly what obligation the consignees of the cargo were under to the shipowner with respect to the discharge of the cargo, and in particular with reference to the time within which the consignees were bound to accept delivery. It is the duty of the consignee to take his goods from the master when he has done his part of the unloading. No time for unloading being specified, the obligation of the defendants to accept delivery was that which is implied by law; in other words, a reasonable time. But this does not solve the difficulty. The questions still remain —What is a reasonable time? How is it to be ascertained? Is it to be ascertained with reference to what is usual, and can be

foreseen and provided for? or with reference to the events which actually happen, whatever they may be? The defendants did all they could under the circumstances which happened. Were they bound to do more? It might be naturally expected that those questions would by this time be clearly settled one way or other by authority; but this is by no means the case. The leading decisions are difficult to reconcile, and the opinions of eminent judges are by no means in accord.

The view that a reasonable time means reasonable, having regard to the events which actually happen, is supported by considerable authority. For example, in *Taylor* v. *Great Northern Ry. Co.* (1), it was held that a railway company, as a carrier of goods, was bound to deliver them in a reasonable time, but was not responsible for delay caused by a block on its line for which it was not responsible. The block was occasioned by the breakdown of a train belonging to another company which had running powers over the defendants' line. Erle, C.J., there said: "When, as in the present case, there is no express contract, there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver using all reasonable exertions." The other judges in that case took the same view. This was also the view taken both by the Court of Queen's Bench and by the Court of Exchequer Chamber in *Ford* v. *Cotesworth* (2), and by Lord Blackburn certainly in *Postlethwaite* v. *Freeland* (3). In *Ford* v. *Cotesworth* (2), which was an action on a charterparty, the stipulation was that the cargo was to be delivered in the usual and customary manner, but nothing was said about time. Owing to a threat of bombardment the cargo could not be landed in the usual time. It was held that the charterer was not liable for the delay. The full import of this case can only be appreciated by attending to the summing-up by Cockburn, C.J., and to the judgments, and to the argument for the plaintiff, and to the ultimate decision. The Lord Chief Justice (4) reserved the question for the Court as to the liability of the defendants under this charter to demurrage for

(1) Law Rep. 1 C. P. 385.
(2) Law Rep. 4 Q. B. 127; Law Rep. 5 Q. B. 544.
(3) 5 App. Cas. 599.
(4) Law Rep. 4 Q. B. 130.

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the time (agreed at seven days) during which the ship lay at her berth, but could not unload owing to the refusal of the authorities to allow the cargo to be landed. And he directed the jury that, the charterparty being silent as to the time for unloading, there arose an implied contract on the part of the freighter to unload and discharge within a reasonable time; and, therefore, if there was any unreasonable delay in unloading the cargo and discharging the ship the plaintiffs were entitled to a verdict—that the question whether the time occupied was reasonable or unreasonable was to be judged with reference to the means and facilities available at the port, and to the regulations and course of business at the port. Then the report of the summing-up goes on thus: "And there would be a point of law whether this question was to be decided with reference to the ordinary state of things at the port or whether any extraordinary circumstances that prevented the unloading might be taken into account. The first question for the jury was whether, looking at the ordinary state of things at the port, there was any unreasonable delay either before the unloading was suspended or after it was resumed. Secondly, whether, looking at the existing, that is, the extraordinary circumstances, there was any unreasonable delay either before the unloading was suspended, or after it was resumed." The jury, in answer to these two questions, found that there had been no unreasonable delay—that is to say, no unreasonable delay, looking at the ordinary course of business at the port, and no unreasonable delay looking at the circumstances that occurred. On that a verdict was entered for the defendants. The plaintiffs then moved for judgment for them, and their application was refused—that is to say, the defendants held their verdict. That was affirmed by the Court of Appeal—the Exchequer Chamber. The decision, as I understand it, was in effect that the question of law thus raised—i.e., the question of reasonableness—must be decided not with reference to the ordinary state of things at the port but with reference to the extraordinary circumstances which prevented the unloading in the usual time. The judgment delivered by Lord Blackburn on the part of the Court of Queen's Bench contains an obscure passage on p. 133; but that judgment proceeded on the principle

that, as the unforeseen occurrence affected both shipowner and charterer alike, and each used reasonable diligence in performing his part of the contract, each performed the only obligation he was under, and, consequently, the action could not be maintained. It will be observed that the decision did not proceed upon the ground that both parties were equally in default, and that neither could complain of the other, but upon the ground that neither party was in default, which is saying, in other words, that there was no default on the part of the defendants. The judgment of Martin, B., in the Exchequer Chamber (1) is as explicit on this point as is the judgment of the Court of Queen's Bench.

In *Postlethwaite* v. *Freeland* (2), a shipowner sued a charterer for not "discharging a cargo with all despatch according to the custom of the port," which the charterer had agreed to do. The point raised in the present case did not there arise, but the case is valuable for the observations made in it on *Ford* v. *Cotesworth* (3), and on *Wright* v. *New Zealand Shipping Co.* (4), which I will refer to presently. Thesiger, L.J. (5), understood *Ford* v. *Cotesworth* as establishing that where no time for unloading is mentioned "the law implies a contract that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls on him." Lord Blackburn expressed the same view when the case came before the House of Lords. (6) His observations are the more valuable as they remove all doubt as to the meaning of the expression "reasonable time under the circumstances." It is clear that he meant under the circumstances which existed at the time of unloading, and Lord Selborne, I think, so understood him. (7) *Burmester* v. *Hodgson* (8) was referred to in all these cases, but does not throw much light on the question. It was an action by a shipowner against the holders of a bill of lading for delay in unloading a cargo of wine in London. Nothing was said about time; but Sir James Mansfield held that there was an implied agreement to unload in the usual and customary time for unloading wine in

(1) Law Rep. 5 Q. B. 548.
(2) 4 Ex. D. 155; 5 App. Cas. 599.
(3) Law Rep. 4 Q. B. 127.
(4) 4 Ex. D. 165.
(5) 4 Ex. D. at p. 160.
(6) 5 App. Cas. at p. 621.
(7) 5 App. Cas. at p. 608.
(8) 2 Camp. 488.

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London. The delay arose from the crowded state of the docks, which prevented the unloading of the ship in her turn into the bonded warehouses, which was the customary way of unloading. Assuming the Chief Justice to have been right as regards the agreement to be implied, the rest followed; but the general proposition that where no time is fixed for unloading it is the charterer's duty to unload at the usual and customary time was emphatically denied by the Court of Queen's Bench in *Ford* v. *Cotesworth* (1), and again by Lord Blackburn in *Postlethwaite* v. *Freeland.* (2) This is an authority, therefore, against the view that in all cases reasonable time means the usual time under ordinary circumstances. The usual and customary time is the proper time under ordinary circumstances, but not necessarily so under extraordinary circumstances.

I pass now to the authorities relied upon in support of that view. Reliance was placed by counsel for the shipowner on such cases as *Adams* v. *Royal Mail Steam Packet Co.* (3) relating to the obligation of charterers to furnish cargoes to ships chartered to carry them. In that particular case there was delay in loading. No time was fixed. The delay was twofold—first, owing to some dispute with a railway company the charterers had no cargo at the place of loading when the ship was ready to receive it; secondly, after the cargo arrived there was a further short delay in loading owing to a strike among the colliers. The Court held the charterers liable for the delay, and no distinction was made between the first period and the second. But for the first delay the second might have been immaterial. Both Williams, J., and Byles, J., pointed out that the real default was in not having a cargo ready to load (see p. 494); but there are undoubtedly expressions in the judgments that the charterers contracted to have coals ready within a reasonable time, and that this was a reasonable time under ordinary circumstances. But, as pointed out in that case by Williams and Byles, JJ., and by Lord Blackburn in *Ford* v. *Cotesworth* (1), the charterer undertakes to have a cargo ready to load by the time the ship is or ought to be ready to receive it; the risk of being unable to provide the cargo falls

(1) Law Rep. 4 Q. B. 137. (2) 5 App. Cas. 621.
(3) 5 C. B. (N.S.) 492.

on the charterer who has to procure it; the uncertain element of reasonable time for procuring a cargo does not in truth enter into his obligation. *Barker* v. *Hodgson* (1) is a well-known illustration of this doctrine. The unconditional nature of a charterer's obligation to furnish a cargo appears, however, to have been lost sight of by Thesiger, L.J., in *Wright* v. *New Zealand Shipping Co.* (2) That was an action by a shipowner against a charterer for delay in unloading. No time was fixed, and the charterer had not provided lighters enough to unload all the ships in which he had cargoes in what would have been a reasonable time if there had been fewer ships to unload. He had brought his difficulties on himself, and he unloaded other ships in preference to the plaintiff's ship, and so detained her. The Court held the charterer liable for the delay, and this, in my opinion, was clearly right, for the defendant was himself responsible for the delay. Lord Bramwell said: "In my judgment a reasonable time for doing an act is a time within which it can be done by a person working reasonably; but the time which he spends in making his preparations for doing the act is not to be taken into account." Cotton, L.J., based his judgment upon the duty of the defendant to supply a sufficient number of lighters to unload the ship in the time usually taken to unload such a ship. Thesiger, L.J., said: "A reasonable time means a reasonable time under ordinary circumstances, and, in the absence of some stipulation altering the implied contract between the parties, the charterers could not be relieved from the consequences of fortuitous or unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be the result of the cases of *Adams* v. *Royal Mail Steam Packet Co.* (3) and *Ford* v. *Cotesworth.* (4)" I cannot myself reconcile this passage with *Ford* v. *Cotesworth* (4), although it is consistent with what was said in *Adams* v. *Royal Mail Steam Packet Co.* (3) It is quite obvious that the view of Thesiger, L.J., is opposed to the opinion of Lord Blackburn in *Postlethwaite* v. *Freeland.* (5) In *Hill* v. *Idle* (6) no time for unloading was specified;

(1) 3 M. & S. 267.
(2) 4 Ex. D. 165.
(3) 7 C. B. (N.S.) 492.
(4) Law Rep. 4 Q. B. 127.
(5) 5 App. Cas. 621.
(6) 4 Camp. 327.

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but the merchant's inability to unload in the usual time was owing to his having shipped a cargo which he could not unship without an order from the Treasury. The delay was caused by himself, and he was properly held responsible for it on that ground. *Wright* v. *New Zealand Shipping Co.* (1) is, I think, another illustration of the same sound principle. *Budgett* v. *Binnington* (2) throws no light upon the question of reasonable time, for there the charterer had undertaken to unload in a specified number of days, and his inability to do so by reason of a strike was no excuse for his breach of contract. *Bessey* v. *Evans* (3) and *Barret* v. *Dutton* (4) are older illustrations of the same principle.

In this state of the authorities it appears to me most in accordance with principle to act upon the maxim, "Lex non cogit ad impossibilia." We have to deal with implied obligations, and I am not aware of any case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control. Where no time for unloading is fixed by contract the merchant's obligation is, in my opinion, to use all reasonable diligence under the circumstances which exist at the time of unloading, unless, indeed, as in *Hill* v. *Idle* (5) and in other cases like it, those circumstances are attributable to his own conduct. Unless he has caused the delay, or unless it has been caused by his agents or servants, he is in no default, and the loss to the shipowner must be borne by him, not because he is in fault, but because he is unable to shew any default on the part of the cargo-owner rendering him liable for the delay from which the shipowner has suffered. It sounds reasonable to say that he who has to find labour must take the risk of the labour market; but this proposition does not solve the difficulty: it leaves out of sight the time within which the labour has to be found. The conclusion at which I have arrived is in harmony with the ordinary course of business; for there are two well-known forms of contract, one with and the other without a specified number of days for

(1) 4 Ex. D. 165.
(2) [1891] 1 Q. B. 35.
(3) 4 Camp. 131.
(4) 4 Camp. 333.
(5) 4 Camp. 327.

unloading. If the first form is used, the risk of a strike falls on the merchant; if the second form is used, it does not, and the risk falls on the shipowner, not because he has agreed to bear it, but because he is unable to throw it on the merchant.

I may add that I have looked for further guidance on the subject in English, American, and other works. The Scotch law as stated in 1 Bell's Com. 623, 7th ed. bk. iii. pt. 1, c. 4 (3), of lay days and demurrage, is in accordance with the conclusion at which I have arrived. Mr. Bell says in that work—which is extremely well done as everybody knows: "Where there is no special contract for lay days and demurrage; nothing said on the subject; or an agreement that the usual time shall be allowed for loading or unloading, the time during which the ship must remain to load or unload will be regulated by what is customary or reasonable or (in circumstances not occasioned by the fault of the shipper) necessary to accomplish those acts . . . . Under this rule the master will not be entitled to demurrage in this case, as where a special contract for days is made, if the delay be occasioned by the crowded state of the docks; nor where the customary mode of delivery of the particular article requires more time than the ordinary delivery. It will be only where the difference in the requisite time of delivery is to be ascribed to the shipper or consignee that demurrage will be due." Mr. Carver, in his work on Carriage by Sea, adopts the same view, as will be seen by reference to paragraph 180. I have not found anything sufficiently clear on the point in American treatises. The French Code de Commerce, s. 274, is at first sight adverse to this view; but it appears to be in practice construed in accordance with it: "If the time for loading and unloading is not fixed by the contract between the parties it is determined by the usage of the places." In Gilberts' Sirey's Commentary (1) I find this: "What if the unloading is delayed by vis major? Decided, that during this delay demurrage does not run in favour of the captain (see decisions in the Court of Marseilles); and that in this case the loss by the delay ought to be borne equally by the captain and the consignee."

For the reasons I have given I am of opinion that the appeal

(1) Vol. ii. Code de Commerce, p. 393, s. 16.

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ought to be allowed, and judgment ought to be entered for the defendants.

FRY, L.J. The state of things in which this litigation comes before us is as follows: It is an action by the shipowner against the consignees, Messrs. Raymond & Reid, on the bill of lading, and it seeks to make them responsible for the unusual delay which occurred in the unloading of the vessel in the London Docks. That delay resulted from the strike of the dock labourers and of the lightermen which occurred during the course of the unloading. Two questions have been raised. The first is one upon the express terms of the bill of lading. That bill of lading contains these words: "The goods are to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom House, otherwise the master or agent is to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods." Then, "the master or agent shall have a lien on the goods for freight and payments made (if any) or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods." It was contended on behalf of the defendants that under the circumstances the master or agent ought to have exercised that liberty, and that not having used the right so given him the shipowner had no cause of action. I am unable to concur in that argument for two reasons. In the first place, the clause does not apply in point of fact. The goods were applied for within the twenty-four hours of the ship's arrival and reporting at the Custom House, and, in my opinion, the clause does not apply to any other event than that which is stipulated for. It does not apply to any difficulty arising in the course of the delivery of the goods after they are applied for. Again, the clause in question confers only a liberty or power; it creates no obligation on the master or agent to put the goods on land, and, therefore, cannot relieve the consignee from any liability under which he may rest.

The second, and far more important, question arises from this fact, that the bill of lading contains no expression with regard to the time in which the discharge is to take place. Therefore, we

have to consider what is the contract to be implied in such a bill of lading.

It is to be observed, in the first place, that this is a case in which concurrent acts are to be done by the shipowner and the merchant. The shipowner is to trim the goods, the merchant is to receive and discharge them from the ship; and, of course, neither can perform his part unless the other is concurrently doing what rests on him to do.

Now, it is found by the judge in this case, and there has been no argument addressed to us to shake his conclusion of fact, that the shipowner had on board abundant help for the trimming, and that there was no difficulty about that operation; consequently the only difficulty in discharging the ship was the difficulty which arose on the part of the merchant to receive the goods after they were trimmed and to discharge them from the ship.

We have therefore a case in which each party has a duty to perform, and in which one only, viz., the merchant, has been prevented from performing his part. I therefore lay aside all those cases in which there are concurrent acts to be done, and both the parties concerned have been prevented from performing those acts. Those cases have no relation to the present controversy. But again, no lay days are defined in the bill of lading; consequently I entirely lay aside the consideration of that class of cases in which lay days have been mentioned, and by which it has been determined from the time of Lord Tenterden down to the recent case of *Budgett* v. *Binnington* (1), that where this is the case the merchant makes himself liable if the vessel is not discharged within the time limited, although the delay may not be attributable to his fault or default. The question then is this. In a bill of lading containing no express stipulation as to discharge, some contract on the side of the ship as to its part in discharging, and some contract on the side of the merchant as to receiving the cargo is implied. What is the contract that is to be so implied on the part of the merchant? Is it to discharge the cargo in the customary or usual time, or in a reasonable time under ordinary circumstances, or in a reasonable time under the actual circumstances which occur, or is it to

(1) 25 Q. B. D. 320; [1891] 1 Q. B. 35.

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discharge with due and reasonable diligence? In some cases the difference between these forms of statement may be immaterial; in the present case the difference appears to be vital.

The question has first to be considered on authority, and I shall first consider those cases which throw light on the particular matter in hand, viz., the implied contract to unload on the part of the consignee. First in point of date occurs the case of *Burmester* v. *Hodgson* (1), before Mansfield, C.J., in the year 1810, in which he held that the implication is to unload "in the usual and customary time." It is impossible, I think, not to feel that that decision was influenced by a case which had been tried three days before, also at Guildhall—the case of *Rodgers* v. *Forresters* (2)—in which these words had been inserted in the bill of lading, and when the Lord Chief Justice came to define the implied contract he adopted the very words of the case which had preceded it by three days. However, that was the conclusion at which he arrived. After that case, there appears to have been no decision upon the point for seventeen years, and then we come to the case of *Rogers* v. *Hunter* (3), before Lord Tenterden, C.J. In that case the bill of lading contained a stipulation for demurrage after a certain number of days from the ship's arrival; in point of fact, the goods were so stowed as not to be accessible within the stipulated time. The Lord Chief Justice held that the stipulation did not apply, and that an implied obligation arose on the consignee to remove the goods "with reasonable despatch" after the possibility of removing them arose. No doubt that case is no longer law on the principal point decided, as will be found by reference to the case of *Porteus* v. *Watney* (4) and other cases; but nevertheless it is highly important as containing an expression of the view of the learned Chief Justice as to the nature of the implied contract to unload. It is to be observed that the implication so arrived at by the Chief Justice differed in a marked manner from that arrived at by Sir James Mansfield in the previous case. The next case arose in 1868, that of *Ford* v. *Cotesworth*. (5) There there was a stipulation

(1) 2 Camp. 488.
(2) 2 Camp. 483.
(3) Mood. & M. 63.
(4) 3 Q. B. D. 227, 534.
(5) Law Rep. 4 Q. B. 127.

to deliver the cargo in the usual and customary manner, but there was nothing expressed with regard to time. The decision of the Queen's Bench was to this effect, that when the act is one in which both parties are to concur each party contracts that he will use reasonable diligence in performing his part, and the case of *Burmester* v. *Hodgson* (1) was expressly disapproved. In 1870 the case of *Ford* v. *Cotesworth* (2) went to the Exchequer Chamber (3), and the Court expressed the implication in a different way: they said it was to discharge "in the usual and customary manner," and, holding that each party was prevented from doing that, they affirmed the decision of the Queen's Bench. Then in 1878, before the Court of Appeal, came the case of *Wright* v. *New Zealand Shipping Co.* (4), where the charterparty was silent as to the discharge, and the implication was stated to be a contract to unload "within a reasonable time"; and they went further, and inquired what was a reasonable time. Now, Bramwell, L.J., said, at page 168: "A reasonable time for doing an act is a time within which it may be done by a person working reasonably"—a statement which obviously assumes that there is a person at work, and therefore excludes circumstances which may prevent his being at work at all. And Thesiger, L.J., said, at page 170: "A reasonable time means a reasonable time under ordinary circumstances," thereby, of course, excluding extraordinary circumstances. The result, therefore, was that the Court in that case implied a contract to unload within a reasonable time judged of by ordinary circumstances, which is obviously a very different thing from using reasonable diligence or using reasonable despatch.

Then came the case of *Postlethwaite* v. *Freeland* (5), in which this question did not actually arise, but in which, nevertheless, there were observations made which bear on the point in hand. What is remarkable is that Thesiger, L.J. (at p. 160), who had been a party to the case I have last mentioned, in this case adopted *Ford* v. *Cotesworth* (2), and stated the implication as one of reasonable diligence. The case of *Postlethwaite* v.

(1) 2 Camp. 488.
(2) Law Rep. 4 Q. B. 127.
(3) Law Rep. 5 Q. B. 544.
(4) 4 Ex. D. 165.
(5) 4 Ex. D. 155.

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Freeland (1) went to the House of Lords (2), and in the judgment of Lord Selborne (at page 608) there is this passage, which seems to me of the greatest importance. After referring to the cases in which time has been fixed, he said, "If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time"—that is, as was said by Blackburn, J., in *Ford* v. *Cotesworth* (3), a reasonable time under all the circumstances. It is obvious, therefore, that not only Lord Selborne, but Lord Blackburn, also agreed in disapproving of the case of *Wright* v. *New Zealand Shipping Co.* (4), which had been decided in the Queen's Bench and the Court of Appeal. These are, I believe, all the cases which bear on the direct inquiry, What authority is there with regard to implication in the case of unloading?

Now the consideration of those cases shews the existence of two distinct and opposing views: the one is that time is to be measured by something which may be ascertained more or less exactly when the contract is entered into, reasonable time under ordinary circumstances, or usual and customary time, which appear to me the same thing. This view had the support of Mansfield, C.J., in *Burmester* v. *Hodgson* (5), of the Exchequer Chamber in *Ford* v. *Cotesworth* (3), and by the Court of Appeal in *Wright* v. *New Zealand Shipping Co.* (4) The other view is that it is to be measured by the actual emergent events, and by the diligence or negligence of the parties concerned under those events—by a measure which cannot be forecast at the time of the contract, but can only be ascertained by the event. This is the "reasonable despatch" says Lord Tenterden, C.J., in *Rogers* v. *Hunter* (6), and this is the "reasonable diligence" of the Court of Queen's Bench in *Ford* v. *Cotesworth* (3), and of Thesiger, L.J., in *Postlethwaite* v. *Freeland.* (1) It is the "reasonable time under the circumstances" referred to by Lord Selborne in *Postlethwaite* v. *Freeland.* (1)

We thus find a very even balance of authority, one which makes it difficult to say in which direction the beam inclines.

(1) 4 Ex. D. 155.
(2) 5 App. Cas. 599.
(3) Law Rep. 4 Q. B. 127.
(4) 4 Ex. D. 165.
(5) 2 Camp. 488.
(6) M. & M. 63.

Parenthetically, I would observe before passing to the other consideration, that if the actual circumstances are to be regarded, it does not follow that all facts are to be considered, e.g., circumstances causing delay which are to any extent within the power or under the control of the consignee might have to be excluded; the question always remains, What circumstances are to be considered?

The next inquiry which I address to myself is this. Is any assistance to be gained from the authorities by way of analogy in reference to other implied obligations as to time? I first turn to that obligation which is the nearest possible to the obligation to unload, viz., the obligation to load. Here we are met with this principle (which creates considerable difficulty in applying these cases to the obligation to unload), that in the implied obligation to load there is an unqualified obligation on the part of the merchant to have the goods ready at the ordinary place of storage, and, therefore, it is only in a case arising between the place of storage and the ship that the question of reasonable time or due diligence can arise. The cases seem to me to be far from clear on the point. They shew symptoms of a tendency to similar differences of opinion to that which I have already indicated in the case of an implied obligation as to unloading. Thus, in *Harris* v. *Dreesman* (1), Parke, B., referred to "a reasonable time under the circumstances," whilst in *Adams* v. *Royal Mail Steam Packet Co.* (2) the Court of Common Pleas referred to "a reasonable time and under ordinary circumstances."

Then I turn to another class of contracts in which an implied obligation of this sort may arise, namely, the case of a common carrier, and upon that there are two authorities. First, the case of *Briddon* v. *Great Northern Ry. Co.* (3); there it was held that the reasonable time implied in the obligation of a carrier is to be ascertained with reference to all the circumstances of the case. So that a snowstorm is an excuse in the case of a cattle train. And, again, in the subsequent case of *Taylor* v. *Great Northern Ry. Co.* (4), the point received a second decision in the same way, and it was held that a common carrier was

(1) 23 L. J. (Ex.) 210.
(2) 5 C. B. (N.S.) 492.
(3) 28 L. J. (Ex.) 51.
(4) Law Rep. 1 C. P. 385.

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bound only to carry within a time reasonable looking at all the circumstances of the case. Erle, C.J., said: "I take reasonable time to mean a time within which a carrier can deliver, using all reasonable exertions." And Byles, J., said: "Reasonable time means a reasonable time looking at all the circumstances of the case." And Montague Smith, J., says, "It must depend on the circumstances of each case what is a reasonable time." Those two decisions are clear, and, so far as I have been able to learn, are unshaken by any other authorities upon the point in hand, viz., the obligation of a common carrier. The analogy of these cases is strong in favour of the view that reasonable time must be determined by reference to the actual events which occur. The beam of the scales in which I have been trying to weigh the opposing authorities is no longer in uncertain equilibrium, but tends distinctly in favour of the view that reasonable time means reasonable time under the circumstances, or, what is the same thing, under all the circumstances of the case.

But, lastly, I approach the question on the ground of principle and reasonableness, and I ask myself which of the two implications is the more natural, the more probable. To my mind it was more probable that each party should say, "I will use diligence; I will do what I can under the circumstances," than that one should say to the other, "I will not only use diligence, but I will be responsible for events over which I have no control." If one party to a contract requires the other to be answerable for such events, it is in my opinion to be expected that he would stipulate for it expressly, and that expectation is strengthened in the present case, because there are well-known forms of bills of lading which do cast the responsibility on the merchant. If the bill of lading requires the discharge to be within ordinary and customary time, or defines the lay days, the merchant becomes answerable for events over which he has no control; but if these familiar forms be not used, the inference seems to me to be that the shipowner and the merchant alike must be taken to say, "We will each do our best," and that they must be taken to have said no more.

I therefore concur in the conclusion my learned brother has arrived at; but, having regard to the great importance of the

matter in controversy, and the fact that we are differing from the decision of the learned judge, I have thought it best to express in my own words the reasons why I conclude that this appeal should be allowed and judgment entered for the defendants.

LINDLEY, L.J. Lopes, L.J., who heard this case, agrees with the conclusion at which we have arrived.

Appeal allowed.

Solicitors for plaintiff: *Downing, Holman, & Co.*
Solicitors for defendants: *Lowless & Co.*

M. W.

[IN THE COURT OF APPEAL.]

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July 23

THARSIS SULPHUR AND COPPER COMPANY, LIMITED *v.* MOREL BROTHERS & CO., AND OTHERS.

Ship—Charterparty—Termination of Voyage—Delivery at Safe Berth as ordered—Demurrage.

By a charterparty the vessel was to proceed to the Mersey and deliver her cargo at any safe berth as ordered on arrival in the dock at Garston. On arrival a berth was ordered, but, owing to the crowded state of the dock, delay occurred which prevented the vessel being berthed for some time after arrival. On a claim by the shipowners for demurrage arising from the delay:—

Held, affirming the judgment of Charles, J., that the obligation of the charterers to unload did not commence till the vessel was berthed.

APPEAL from the judgment of Charles, J.

The action was brought by the plaintiffs as charterers of several vessels for non-delivery of certain copper ore and damages for its detention. The question in the case arose on the counterclaim of the defendants, Messrs. Richards & Co., for damages in the nature of demurrage for delay of the plaintiffs in unloading the vessels. The contract under which the vessels were employed contained the following clauses: "3 b. The steamers will load from the factory of the charterers . . . . and being so loaded shall therewith proceed to the Mersey (or so near thereunto as they may safely get), and deliver the same at any safe berth as ordered on arrival in the dock at Garston. 4. Three working days, after being in turn, shall be allotted to the charterers (if the steamers are not sooner despatched) for loading up any quantity up to 1200 tons, and four days if the quantity exceeds

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1200 and up to 1700 tons, and to be discharged when berthed with all despatch, as customary at the port of discharge with steamers carrying similar cargoes."

On arrival a berth was ordered by the harbour-master, as customary at this dock, but there was delay in unloading due to the crowded state of the dock, which prevented the vessels being berthed for some time after arrival. When berthed they were discharged with reasonable despatch. The question raised at the trial was at what time the obligation of the charterers to discharge commenced. The learned judge decided that the obligation did not commence till the vessel was berthed, and gave judgment for the plaintiffs.

The defendants, Richards & Co., appealed.

Kennedy, Q.C., and *Joseph Walton*, in support of the appeal. The question is who is to take the risk of there being no free berth when the ship arrives in Garston Dock. This responsibility must rest with the charterers. The vessel had arrived and was placed at their disposal, and so far as the shipowners were concerned the voyage was at an end. The option given to the charterers was not properly exercised by them unless they named an available berth. *Murphy* v. *Coffin* (1) is opposed to this view, but *Davies* v. *McVeagh* (2), and *The Carisbrook* (3), support it. [They also cited *Nelson* v. *Dahl* (4); *Ashcroft* v. *Crow Orchard Colliery Co.* (5); *Pyman* v. *Dreyfus* (6); and *Dall' Orso* v. *Mason & Co.* (7)]

J. G. Barnes, Q.C., and *P. C. Morris*, contrà. The charterers are not responsible for delay until the ship is berthed. The argument on the other side would read into the contract the term that the charterers were to name a ready berth, as in *Harris* v. *Jacobs* (8). *Tapscott* v. *Balfour* (9) shews that the option is absolute. The decision in *Davies* v. *McVeagh* (2) is explained in *Nelson* v. *Dahl* (4), and the explanation removes the apparent

(1) 12 Q. B. D. 87.
(2) 4 Ex. D. 265.
(3) 15 P. D. 98.
(4) 12 Ch. D. 568; 6 App. Cas. 38.
(5) Law Rep. 9 Q. B. 540.
(6) 24 Q. B. D. 152.
(7) 3 Court Sess. Cas. 4th Series. 419.
(8) 15 Q. B. D. 247.
(9) Law Rep. 8 C. P. 46.

inconsistency with other cases. This is not noticed in the judgment in *The Carisbrook* (1), and it is submitted that that judgment cannot be supported.

Kennedy, Q.C., in reply.

LORD ESHER, M.R. *Nelson* v. *Dahl* (2) does not govern this case, though it settled many points with regard to charterparties. The object of a charterparty is to fix the contract of the shipowner and the shipper as to the carriage and delivery of the goods of the latter on board ship from one place to another. It is therefore necessary that the charterparty should deal with the time, place, and manner of loading the goods on board, the time and possible course of the voyage, and the time and mode of discharging the cargo from the ship. When it is required to determine the mode of delivering the cargo, it is necessary to determine the time and place of the termination of the voyage, because there cannot be delivery till that is ended. In the present case we have nothing to do with the description of the beginning of the voyage or the obligations as to loading, but only with the unloading, and we must see when on the true construction of the charterparty the voyage came to an end. The end of a carrying voyage is sometimes when the ship arrives at a particular port, sometimes when she arrives in a river, and at others when she is in a dock. These cases are settled by *Nelson* v. *Dahl* (2), but that case does not deal with a charterparty which stipulates for the delivery of the cargo at any safe berth as ordered on arrival in a particular port, and reserves an option to be exercised by the charterer as to the choice of a berth. This is not a case of merely carrying to the Mersey, but of carrying to Garston Dock, which is high up the Mersey. If that were all, the carrying voyage would end at Garston Dock, but it is not all, for the vessel is to deliver "at any safe berth as ordered." Suppose there had been berths with numbers, and the contract had been to deliver at berth No. 1, the cases shew that the carrying voyage would not be at an end till the ship arrived and was ready to deliver at that No. 1 berth. The contract does not express any particular berth, but it does express the

(1) 15 P. D. 98. (2) 12 Ch. D. 568.

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equivalent to that in using the words "as ordered," which I take to mean as ordered by the charterers. Does that give the charterers the right to fix the place where the carrying voyage is to end? Even without authority I should say that it did, but *Tapscott* v. *Balfour* (1) has dealt with a charterparty in a similar form, where a particular dock has to be named, the necessary result of the agreement being that when the charterer exercises that power, the result is the same as if the dock had been named in the charterparty. That was decided nineteen years ago, and as it was a decision on a question of frequent mercantile interest, we should not interfere with the decision unless we were fully convinced that it was wrong. So far from entertaining that opinion I think the decision was quite right, and that when the charterer has to name a dock or a place in a dock, when he does so, it is as though it had been named in the charterparty, and indicates the termination of the voyage. To hold otherwise would be to give no effect to the words "as ordered." It seems to me that *Murphy* v. *Coffin* (2), decided in 1883, follows and adopts the ruling in the previous case. I do not desire in this case to decide whether *Davies* v. *McVeagh* (3) was rightly or wrongly decided. It is open to an interpretation which would make the decision wrong, and opposed to *Nelson* v. *Dahl* (4), but if that is the correct interpretation it would follow that I must have decided the point of law in a different way in two cases that were decided at about the same time. (5) I cannot help thinking that the explanation of that decision is that which I pointed out in *Nelson* v. *Dahl.* (4) That the description of the dock as the Wellington Dock, High Level, was taken to mean the Wellington Dock, and not a particular portion of it. It does not signify in the present case whether that view is right or wrong, for the question here is what is the termination of the carrying voyage, and on that point I think the interpretation of the charterparty is clearly that which the learned judge placed on it. The appeal will therefore be dismissed.

(1) Law Rep. 8 C. P. 46.
(2) 12 Q. B. D. 87.
(3) 4 Ex. D. 265.
(4) 12 Ch. D. 568.
(5) See *Strahan* v. *Gabriel*, referred to in *Nelson* v. *Dahl*, 12 Ch. D. 568, at p. 589.

BOWEN, L.J. I am of the same opinion. The case is one which turns on the construction of a charterparty, and of course no rule can be laid down which will apply in all cases. But charterparties are well-known documents, and the Court is accustomed to travel on well-known lines of construction in the interpretation of them.

This case is not governed by the decision in *Nelson* v. *Dahl* (1), nevertheless, on the language used in that decision we are safe in taking this step forward, and saying that the risk of the charterer as to demurrage begins when the carrying voyage ends, and we must look to the charterparty to see when that is. A good deal of the confusion which has prevailed has arisen from a misconception of the decision in *Davies* v. *McVeagh.* (2) It is clear to me, upon reading the judgments and the exposition of them given in *Nelson* v. *Dahl* (1), that the Court came to the conclusion that loading in the Wellington Dock, High Level, meant loading in the Wellington Dock which has the high level. Whether the Court rightly so construed the document is immaterial for the present case. Once arrive at that conclusion and the running days were to begin from the entry of the ship into that dock. But that case has been used and pressed for purposes beyond the real point decided, and to support the untenable contention that when a larger place, and a smaller one within the larger, are named for loading or discharge in the charterparty, the carrying voyage necessarily begins or ends on arrival at the larger place. I do not think that is the law, and to that extent it seems to me to be desirable to say that no such law can properly be deduced from the decision in *Davies* v. *McVeagh.* (2)

The present case is one in which an option is given to the charterer to do that which the charterparty has not done, that is, to name the terminus of the voyage, and a broad proposition has been put forward that as soon as the ship is at the disposition of the charterer the voyage is at an end. The words of this proposition are full of ambiguity. If it means that as soon as the ship arrives at the place where the charterer is to exercise his option, the demurrage days begin, the proposition is too large. The time at which the charterer is in this case to name a berth

(1) 12 Ch. D. 568. (2) 4 Ex. D. 265.

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for the unloading of the ship is on her arrival at the Garston Dock, but it may well be in other cases that at the time when the option is exercised the place to be named may be at a distance from where the ship is, and it could not be in such a case that the duty to unload should commence at once. If the time meant is when the ship is placed at the disposal of the charterer for the purpose of unloading, that does not solve the difficulty, but brings us back to the same question—when is the carrying voyage at an end? *Tapscott* v. *Balfour* (1) laid down clearly that where the place at which the carrying voyage is to end is not stated in the charterparty, but is to be named by the charterer, the selection of a dock has precisely the same effect as if that dock had been originally named in the charterparty, and the same principle is applicable to the case before us.

Then we were told that an option was given to the charterer, and that it was not properly exercised unless a berth was chosen that was empty. But I think there was a confusion in this argument also. The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock, that is one that is reasonably fit for the purpose of delivery. It will not do for instance to choose a dock the entrance to which is blocked—that would be practically no exercise at all of the option, and I think this is what Blackburn, J., meant in *Nelson* v. *Dahl* (2), and follows from the cases he there cited of *Ogden* v. *Graham* (3) and *Samuel* v. *Royal Exchange Association Co.* (4) To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option. The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time. I have already dealt with the case of *Davies* v. *McVeagh* (5), and as to *The Carisbrook* (6), so far as I can see, it was wrongly decided, and if it is

(1) Law Rep. 8 C. P. 46.
(2) 6 App. Cas. 38, at p. 44.
(3) 1 B. & S. 773.
(4) 8 B. & C. 119.
(5) 4 Ex. D. 265.
(6) 15 P. D. 98.

inconsistent with our decision in this case it cannot be supported. The only other case to notice is *Dall' Orso* v. *Mason & Co.* (1), and after what I have said I do not think it necessary to do more than express dissent from the language used in that decision.

Dealing with the present case on the lines of construction which I have indicated I am of opinion that the end of the carrying voyage dealt with in the charterparty was the arrival of the ship at the named berth, and that the decision of the learned judge must be supported.

KAY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Wynne, Holme, & Wynne, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for defendants: *Rowcliffes, Rawle, & Co., for Hill, Dickinson & Co., Liverpool.*

A. M.

[IN THE COURT OF APPEAL.]

C.
July 6, 7.

BRISTOL AND WEST OF ENGLAND BANK *v.* MIDLAND RAILWAY COMPANY.

Ship—Bill of Lading—Trover—Pledge—Bills of Lading Act (18 & 19 *Vict. c.* 111), *s.* 1.

In an action for wrongfully depriving the plaintiffs of goods, it appeared that the goods had been consigned to England from a colony. The bills of lading provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee against the consignment, and sold the bills of exchange, with the bills of lading annexed, which he had indorsed in blank, to a colonial bank, who sent them to a bank in London, with a hypothecation note empowering the London bank to sell the goods if the bills of exchange were not accepted or not paid at maturity. The goods arrived in England, and were delivered to the defendants, who were a railway company, to be delivered to the order of the shipowners. The consignee paid the freight and other shipping charges and accepted the bills of exchange, but before the bills became due, he induced the defendants wrongfully to deliver the goods to him without producing a delivery order from the shipowners. When the bills became due the consignee requested the plaintiffs to advance the money and take up the bills. They did so, and received the bills of exchange and the bills of lading from the London bank, and ultimately

(1) 3 Court Sess. Cas. 4th Series, 419.

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obtained delivery orders from the shipowners in exchange for the bills of lading. When they presented the delivery orders to the defendants they found that the goods had been already given up to the consignee, and they thereupon commenced the present action :—

Held, first, that the plaintiffs must be taken to be pledgees of the goods, and had therefore a property sufficient to entitle them to maintain the action independently of the Bills of Lading Act. Secondly, that the plaintiffs' right of action was not affected by the fact that at the date of the wrongful delivery they had not acquired their title to the goods.

APPEAL from a judgment of Lord Coleridge, C.J., on the trial of an action at Bristol.

The action was brought to recover the value of certain boxes of cheeses and butter, alleged to have been wrongfully delivered by the defendants.

At the trial it appeared that R. W. Clark, a provision merchant at Bristol, was in the habit of importing large quantities of cheese and butter from Canada, which he purchased from Messrs. Hodgson & Co., of Montreal. The goods in question in this action were shipped by the last-mentioned firm in Canada on board ships of the Dominion line of steamers, of which Messrs. Flinn & Co. were managing directors. The bills of lading were in the usual form, the goods to be delivered to the order of the shippers or their assigns, and the bills of lading to be given up in exchange for the delivery orders. Hodgson & Co. sent the invoices to Clark, and drew bills of exchange on him for the value of the goods. They sold the bills of exchange, with the bills of lading attached, which they had indorsed in blank, to the Toronto Bank. The Toronto Bank forwarded them to the City Bank, their agents in London, with a hypothecation note, by which it was expressed that if Clark should decline to accept the bills of exchange, or if his acceptance should not be satisfactory to the bank, or if the bills should not be paid at maturity, the bank was authorized to retain the bills of lading and to place the goods in the hands of their brokers for sale.

The goods were landed at Avonmouth in August and September, 1890, and were there handed over to the defendants with a consignment note signed by Flinn & Co., instructing them to carry them to Bristol and hold them to the order of Flinn & Co. The goods were carried to Bristol on the defendants' railway, and

were warehoused by the defendants to the order of Flinn & Co., in accordance with the terms of the consignment notes.

Clark paid the freight and other shipping dues, and the expense of the carriage to Bristol, and accepted the bills of exchange, which were at sixty days' sight, for the value of the goods. Before the bills became due Clark persuaded the defendants' servants to deliver to him the greater part of the boxes of cheese and butter without producing to them any delivery orders from Flinn & Co. It was admitted by the defendants that the delivery was wrongful, and was due to the misconduct of their servants.

As each bill of exchange became due Clark requested the plaintiffs, with whom he had an account, to pay the bills and to debit his account with the amount. This they did and received from the City Bank the bills of exchange with the bills of lading attached. The plaintiffs took the bills of lading to Messrs. Flinn and obtained from them delivery orders in exchange for them; but on presenting the delivery orders to the defendants they were only able to obtain a small portion of the goods, the remainder having been delivered to Clark, as before mentioned.

Early in the month of December, 1890, Clark became bankrupt, and the plaintiffs then brought the present action against the defendants, claiming damages for the wrongful conversion of the goods which they had parted with.

The jury having been discharged by consent, his Lordship reserved the case for further consideration, and subsequently gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Bucknill, Q.C., Castle, Q.C., and *J. V. Austin,* for the defendants. The action in its present form cannot be maintained. If any wrongful act was ever done by the defendant company, it was done before the plaintiffs acquired any title to the goods, and they have no right of action at all. Whatever rights they had were derived through Clark, and Clark could not put anyone else in a better position than himself. To recover in trover or detinue, the plaintiffs must shew an absolute title at the time of the conversion and of the writ, and this they cannot do. In

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Goodman v. *Boycott* (1), there was a declaration in detinue for title deeds, and the defendant's plea shewed that he had lost the deeds before they became the plaintiff's property. In that case Blackburn, J., said, "As a general rule causes of action already accrued do not run with the property in goods or deeds. This plaintiff could maintain no action of trover or trespass for any act done to the deeds before they were his, nor could he maintain in his own name any action on the contract of bailment for the loss admitted by the demurrer to have taken place before the plaintiff had any property in them." It is true that in this case the opinion of Wightman, J., differed from that of Blackburn, J., and judgment was entered in conformity with the opinion of the senior judge. But the opinion which Blackburn, J., felt himself bound to express is entitled to great weight, and is in accordance with sound principles: *Lord* v. *Price.* (2) The plaintiffs in this case cannot therefore maintain this action against the defendants, even supposing (which is denied) that ever they became the actual owners of the goods; they must get them if they can from the persons to whom they have been delivered, and they cannot proceed against persons who have already parted with them.

The plaintiffs, however, never were the true owners of the goods. Clark never indorsed the bills of lading to them, and they never were holders of those bills so as to possess a title at law. The hypothecation note gave no authority, except an authority to the City Bank to retain the bills of lading. The plaintiffs took at most a lien only without any right of property or possession. The agreement was that Clark should have delivery of the bills of lading so soon as he paid the freight and shipping charges. Clark did this and accepted the bills of exchange, and so became the owner of the goods, and the bills of lading then became exhausted and dead. Clark could not give more than he had a right to give, and the plaintiffs in fact never had any title to the goods; they only had a lien upon an exhausted security, and the action is neither maintainable at common law, nor under 18 & 19 Vict. c. 111. Lord Bramwell's judgment in *Sewell* v. *Burdick* (3) is an authority for this proposition.

(1) 2 B. & S. 1. (2) Law Rep. 9 Ex. 54.
(3) 10 App. Cas. 74, 103.

The only question is, whether the defendants can be made liable upon any contract with Flinn & Co., and the learned judge of the Court below seems to have treated the goods as though they had been the property of Flinn & Co. But this they never were; and the defendants, who were carriers of goods acting as warehousemen of goods they have carried, are not estopped from shewing, as they have done, that the person who actually deposited the goods with them was not the true owner: *Sheridan* v. *New Quay Co.* (1)

[They also referred to *Barber* v. *Meyerstein.* (2)]

Sir W. Phillimore, Q.C., Poole, Q.C., and *L. E. Pyke,* for the plaintiffs. In this case the plaintiffs who had advanced money on certain goods came to the defendants upon a particular day and produced delivery orders for the goods which had been pledged to them. The validity of the orders is admitted, and whatever goods the defendants had they gave over to the plaintiffs. But for the fraud of Clark and the negligence of the defendants the plaintiffs would have had all the goods which had been pledged to them. The only answer of the defendants to the plaintiffs is that they had already given the rest of the goods to Clark.

[LOPES, L.J. Up to demand and refusal there was no conversion.]

There was no conversion until refusal; for this purpose, the tort is the refusal.

[LOPES, L.J. Delivery to a wrong person would be conversion.]

Clark had no title at all to the goods: the right to receive them had passed entirely to the plaintiffs, who were the holders of the bills of lading as pledgees, independently of the Bills of Lading Act (18 & 19 Vict. c. 111, s. 1): *Short* v. *Simpson* (3); *Sewell* v. *Burdick.* (4) It is true that the goods had been delivered; but, until they were delivered to the right person, the property and right of action in respect of them remained in the holders of the bills of lading: *Mirabita* v. *Imperial Ottoman Bank* (5); *Barber* v. *Meyerstein* (2); *Glyn, Mills & Co.* v. *East*

(1) 28 L. J. (N.S.) C. P. 58.
(2) Law Rep. 4 H. L. 317.
(3) Law Rep. 1 C. P. 248.
(4) 10 App. Cas. 74.
(5) 3 Ex. D. 164.

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and West India Dock Co. (1) The hypothecation note shews the intention of the parties—that the holders of the bills of lading should have all the powers of mortgagees. The defendants were wharfingers, and it was their duty to retain the goods till proper delivery orders were presented to them: *Carr* v. *London and North-Western Ry. Co.* (2) It is contended by the defendants that, at the time when the plaintiffs' title accrued, the goods had already been parted with, and therefore the plaintiffs had no right of action for their wrongful conversion. But it makes no difference when the plaintiffs' title accrued. If the goods had not been wrongfully parted with, they would have been in the defendants' possession when the plaintiffs' title accrued, and the defendants cannot set up their own wrong in bar of the action: *Goodman* v. *Boycott* (3); *Short* v. *Simpson* (4); *Pirie* v. *Warden.* (5)

Castle, Q.C., in reply.

LINDLEY, L.J. This is an action by the plaintiffs, who are the Bristol and West of England Bank, to recover damages for the non-delivery of goods which they say were theirs. The facts are a little complicated, but the outline of them is not difficult to state. There was a man named Clark, a customer of the plaintiffs. Clark bought cheese for sale, of course in the expectation of making a profit. He employed a person, named Hodgson, in Canada to buy cheeses for him, and Hodgson bought them and shipped them to Bristol, and the bill of lading which we have before us is in the ordinary form. The cheeses were "to be delivered from the ship's deck," and so on, "unto shipper's orders or to their assigns, freight payable by consignee at the rate of, &c." There "consignee" obviously means the person who claims under the shipper—it does not mean somebody else. "The goods to be received by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the sole expense and risk of their owner in the warehouse provided for that purpose, or in the public store, as the

(1) 7 App. Cas. 591.
(2) Law Rep. 10 C. P. 307.
(3) 2 B. & S. 1.
(4) Law Rep. 1 C. P. 248.
(5) Scotch Sess. Cas. 3rd Series, vol. ix., p. 523.

collector of the port shall direct, and when deposited in the public store to be subject to rent," and so on. Then it says: "Freight, if payable by shippers, is due in full in exchange for bill of lading, or if payable by consignees, on arrival of goods at place of destination in exchange for delivery order. Settlement in either case to be made without discount or abatement." I think those are the only important passages in the bill of lading, and that was indorsed by Hodgson, who was the shipper. The other bills of lading were in the same form. The bills of lading were sent with bills of exchange drawn on Clark for the price to a bank at Toronto, and the bank at Toronto sent the documents (the bills of exchange and the bills of lading, and, I suppose, the insurance) to a London bank, the City Bank, in this particular case. The City Bank were the holders both of the bills of lading and of the bills of exchange. They sent the documents down to Bristol, shewed them to Clark, and got Clark to accept the bills of exchange; but the City Bank were not merely agents to collect for the Toronto Bank. The City Bank bought the bills of exchange, and that is shewn by what is called a hypothecation note, which I do not attach very much importance to, although it has been a great deal discussed. It merely shews the fact that the City Bank were the buyers of the bills of exchange, and with them they had the bills of lading. The hypothecation note runs thus. It is to the manager of the City Bank, Limited, London, and it is written by Hodgson: "We have this day sold to the Bank of Toronto a bill of exchange for 390*l.*," and so on, "on R. W. Clark, Esq., Bristol, against a shipment of 208 boxes cheese ex *Indiana*, Bristol. The agreement with the Bank of Toronto is, that the bills of lading are to be given up to R. W. Clark, Esq., Bristol, on payment, or banker's guarantee, without prejudice to your claim on us in the event of the bill not being paid at maturity; but if they decline to accept, or if the acceptance is not satisfactory to you, or if the bill be not paid at maturity, then you are hereby authorized to retain the bills of lading, and at any time at your discretion to place the 208 boxes of cheese in the hands of your brokers for sale," and so on. Now, it is quite obvious to me that the position of the City Bank was this. They were holders for value of the bills of

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exchange. They were entitled to sue Clark upon them, and to recover the money. They had as security for these bills of exchange the bills of lading for the cheeses. In other words, they were pledgees at law of these cheeses—not under the Bills of Lading Act, but quite apart from it. They had a right on the production of the bills of lading, and payment of freight, to receive the cheeses from the shipowners or the warehouseman where they might be stored. That was their position.

Now it appears that when the bills were about to become due Clark could not take them up. Clark requested the plaintiffs to take them up and pay them. This the plaintiffs did, and they got from the City Bank the bills of exchange and the bills of lading which were indorsed in blank, and they became by that transaction the transferees of the title of the City Bank at the request of Clark. That is their position. They have the same title to the goods that the City Bank had—a title to sue as pledgees of the goods at law for delivery of the goods, of course, upon payment of the freight, if the freight has not been paid.

Then they go to the defendants for the goods. The defendants had received the goods from the shipowner at Avonmouth. They were to go to Bristol, and by the custom of the trade they were transhipped at Avonmouth, and Flinn & Co., who acted for the shipowners, deposited them with the defendants to carry them, as I understand it, to Bristol, and then to deliver on the order of Flinn & Co. Flinn & Co. would have no business to part with them except upon the production of the bills of lading. They could not give a valid order—at least they could not, except at their risk and the risk of their masters and employers, deliver the goods to anybody, except to those who were entitled to them. They had no more right to deliver them to Clark than he had to deliver them to me. Clark goes to the shipowners and pays the freight. He does not produce the bills of lading. He pays the freight when the bills of lading and the bills of exchange are still in the hands of the City Bank. Clark gets the goods, whether by a false pretence or by misplaced confidence I do not know; but he gets the goods from the defendants who had no right to deliver them to him. He produces no delivery order or anything else. In other words, he

cheats the City Bank; the goods belonging to the City Bank as pledgees of the bills of lading.

Now comes the question whether the plaintiffs can sue the defendants in respect of those goods. My answer is "Yes." I see no difficulty at all about it, except the difficulty which I will allude to presently. If the plaintiffs had as assignees the same title to these goods that the City Bank had, they were owners of the goods and could sue, in trover or detinue at common law, quite apart from the Bills of Lading Act, anybody who wrongfully withheld those goods. They go to the defendants, and the defendants say: "No, we cannot give them to you. We gave them to Clark." Is that any answer? There is the whole difficulty. The defendants' counsel says, upon the authority of *Goodman* v. *Boycott* (1), that the plaintiffs cannot sue. He says: "Supposing that you are (as you say, but which I deny,) the owners of these goods, you must get them from those who have got them; do not come to me who have not got them." And the question arises whether it lies in the mouth of the defendants to say: "We have not got them," when they have wrongfully parted with them. My answer is "No." The defendants have the very high authority of Lord Blackburn for saying "Yes." He however differed from the learned judge who was his colleague, Wightman, J., in the case referred to. Lord Blackburn's view is, moreover, opposed to that taken by Willes, J., in the later case of *Short* v. *Simpson* (2), and is inconsistent, also, with the Scotch case, *Pirie* v. *Warden*. (3)

The view taken by Lord Blackburn turned, I think, on a mere question of pleading. Lord Blackburn's difficulty would have been got rid of immediately if the vendor to the plaintiff had been a co-plaintiff. There would have been no answer to the action at all. So here, if the City Bank were co-plaintiffs there would be no answer at all.

Well, is there anything which ought to induce us to say that this action cannot be maintained because the City Bank are not co-plaintiffs? My answer is "No." The difficulty resolves itself into a mere question of pleading, and there is no substance in

(1) 2 B. & S. 1. (2) Law Rep. 1 C. P. 248.
(3) Scotch Sess. Cas. 3rd Series, vol. ix. p. 523.

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it. If we were to decide differently, we should be holding that the defendants had wrongfully got rid of 1800*l.* worth of goods, and were answerable to nobody at all, which is sheer nonsense.

It appears to me, therefore, that this case has been rightly decided, and the appeal must be dismissed; but I am not prepared to decide it on the ground on which the Lord Chief Justice decided it, namely, that the plaintiffs are entitled to these goods, and to recover them under colour of Flinn & Co.'s title. I do not understand myself that Flinn & Co.'s delivery order which the plaintiffs had was important, except in this respect; it was a condition precedent to their obtaining delivery of the goods. They had the delivery order for what it was worth; but their title to the goods does not turn on the delivery order from Flinn & Co. It turns on the bills of lading which they got from the City Bank.

This appeal must be dismissed, and dismissed with costs.

FRY, L.J. I am of the same opinion, and when the facts of this case are threshed out, it appears to me that the plaintiffs' title to recover is not very difficult to be stated. According to the view I take, the bills of lading were pledged to the Toronto Bank at the same time that the bills of exchange were sold to that bank. That bank became, in my opinion, pledgees of the bills. That pledge appears to have been transferred by the Toronto Bank to the City Bank, and, thereupon, they were the pledgees of the bills of lading; they had the property in the goods.

Whilst they had that property in the goods as pledgees, a wrongful act was done by the defendant company. They delivered the goods which they had no right so to deliver, to Clark. But that wrongful act did not displace the property which was vested in the City Bank. Their property as pledgees still remained. When the Bristol Bank came to the City Bank and took up the bills of exchange, they did it, in my judgment, with the intention of becoming the assigns of all the rights of the City Bank. It has been argued that they did not so do, that they came as agents for Clark, and that they were merely to get back for Clark some right in these bills. In my judgment that is not the true nature of the transaction between the parties.

The probable, the natural, the reasonable transaction is one by which the Bristol Bank were to acquire all the rights of the City Bank,—to use the well-known expression, they were to stand in the shoes of the City Bank. The right of property, therefore, which the City Bank had in these goods when the Bristol Bank paid them, was transferred from the City Bank to the Bristol Bank. They became pledgees of the goods, and, as such pledgees, can maintain trover or detinue for the goods.

When they apply for the goods they are told that the goods are not there. Primâ facie that gives them a perfect cause of action, either of trover or detinue, against the defendants, who ought to have had the goods; and the only question—the only point, at any rate, for consideration—is this, whether a defence is afforded by the fact that the wrongful act of the defendant company was done before the accruer of the plaintiffs' title.

That very point occurred for decision in *Goodman* v. *Boycott* (1), nearly thirty years ago, and was then determined in the negative by the judgment of the senior judge. It was held that it made no difference whether the wrongful act was before or after the accrual of the plaintiff's title. It is quite true that the very eminent colleague of that learned judge differed from him. That decision appears to have stood from the year 1862 down to the present time unquestioned. No cases have been called to our attention, in which any doubt has been thrown on the propriety of the decision of Wightman, J. On the contrary, it appears to me that a similar view was taken by Willes, J., in the case of *Short* v. *Simpson* (2), and was also taken in the Scotch case, *Pirie* v. *Warden.* (3)

But, further than that, it appears to me to be good law and good sense, which in this case, at any rate, and I hope in most cases, are the same thing. I think it is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. He who ought to produce the goods of the man who has the title to the goods and the property in the goods, cannot

(1) 2 B. & S. 1. (2) Law Rep. 1 C. P. 248.
(3) Scotch Sess. Cas. 3rd Series, vol. ix. p. 523.

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discharge himself by saying, "I have wrongfully made away with them, but that was before the accruer of your title."

I further agree with what has been said by the Lord Justice that the point becomes one really of mere pleading, and I think the decision of Wightman, J., in the case which I have referred to, was consonant with good sense, with the habits of business men, and is thoroughly right. I, therefore, have no hesitation in saying that that defence, in my judgment, does not avail the defendants. The plaintiffs have a perfectly good common law title, independent of the Bills of Lading Act, under which they can sue the defendants in their character as pledgees of these goods, and the defendants, not producing the goods, have no valid answer in saying, "We made away with them before your title accrued."

LOPES, L.J. This case, in my opinion, is outside the Bills of Lading Act, and, after a careful consideration of the evidence which has been placed before us, I am of opinion that the position of the plaintiffs is that of pledgees of the bills of lading. The case of *Sewell* v. *Burdick* (1) establishes this, that the first section of the Bills of Lading Act does not apply to pledgees of bills of lading, as the pledgees have a special property in the goods, and can bring at common law either trover or detinue. Therefore, with regard to that point, when the case is thoroughly understood, I do not think it is difficult to decide it.

But another point was raised by the counsel for the defendants which is not so easy of solution. It was said that the plaintiffs cannot maintain a trover in this case, because the defendants were no longer in possession of the goods at the time the plaintiffs' title accrued, and that the plaintiffs must sue those persons who had possession of the goods at the time the plaintiffs' title accrued and this cause of action arose. The case of *Goodman* v. *Boycott* (2) was cited with regard to this matter, and it is somewhat extraordinary that it is the only authority on this point, and it is also remarkable that in that case, which was decided by two judges, those judges disagreed, the judgment of

(1) 10 App. Cas. 74. (2) 2 B. & S. 1.

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Wightman, J., prevailing, as he was the senior judge. Now, I have carefully read the reasoning of those two learned judges, and, for myself, I prefer the reasoning of Wightman, J., and I am very impressed with the observation which I find in the course of his judgment. He says: "The plaintiff is the owner, and they are detained from him, without sufficient legal excuse, by the defendant, who ought to be in possession of them. If this action is not maintainable, I do not see how any action can be maintained by anybody, though the plaintiff has sustained great damage." Now that case, as has been observed by my brother Fry, has not been in any way criticized or adversely criticized, if at all, since the year 1862; and, moreover, it is a case in conformity with a recent decision, the Scotch case, *Pirie* v. *Warden* (1), and also is in conformity, as is our present judgment, with an expression of opinion by Willes, J., in the case of *Short* v. *Simpson*. (2) I am of opinion, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Fussell & Co.*
Solicitors for defendants: *Beale & Co.*

M. W.

[IN THE COURT OF APPEAL.]

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June 26.

IN RE THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883. GOUGH *v.* GOUGH.

Landlord and Tenant—Compensation for Improvements—Charge on Holding—Executors of deceased Tenant for Life—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 29, 61.

Under the Agricultural Holdings (England) Act, 1883, the executors of a landlord, tenant for life, who have been compelled under the Act to pay compensation for improvements to an outgoing tenant, who had claimed compensation and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid.

APPEAL by the executors of John Gough, deceased, against an order of the judge of the Wells County Court dismissing their petition, which had been presented under s. 29 of the Agricultural

(1) Scotch Sess. Cas. 3rd Series, vol. ix. p. 523. (2) Law Rep. 1 C. P. 248.

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Holdings (England) Act, 1883 (46 & 47 Vict. c. 61). The petition asked for an order, charging a holding with payment to the petitioners of 35*l.* paid by them to an outgoing tenant, J. W. Huggett. J. Gough, the deceased, was the tenant for life of a farm, and J. W. Huggett was yearly tenant of the farm under him. Huggett's tenancy was determined by him by a notice to quit expiring on March 25, 1890, and before the expiration of his tenancy he claimed compensation under the Act for improvements. Two valuers were appointed, and they, on April 5, agreed upon 35*l.* as the amount of compensation to be paid under s. 8 of the Act. On April 8 Gough died, having up to that time been in receipt of the rents and profits of the land in question as tenant for life. The ownership then passed to the remainderman in fee. On April 24 the executors of J. Gough paid the sum of 35*l.* to Huggett, and they afterwards presented a petition to the county court in order to obtain a charge upon the holding for that amount. The improvements in respect of which the compensation was awarded would become exhausted at Michaelmas, 1891. The learned county court judge dismissed the petition, upon the ground that the executors of a landlord are not entitled to obtain such a charge under the Act. The executors appealed.

1891. January 29. *H. F. Lawes*, for the executors.
Garland, for the remainderman.

Cur. adv. vult.

April 14. VAUGHAN WILLIAMS, J. The question in this case is, whether the word "landlord" in s. 29 of the Agricultural Holdings (England) Act, 1883, includes the executors of the landlord, so as to enable them to obtain from the county court a charge on the holding. I think that the word "landlord" in that section does include the executors of the landlord.

The argument against this construction is based entirely on the fact that the definition section, s. 61, defines landlord "as any person for the time being entitled to receive the rents and profits" of any holding, and makes no mention of the personal representatives of the landlord; whereas the definition of a tenant expressly includes the executors, administrators, and assigns of the

tenant, and any person deriving title from the tenant. This definition clause does certainly primâ facie give rise to the presumption that in this Act "landlord" does not include the executors of the landlord; but it seems to me that if, the Act is looked at as a whole, the presumption arising from the words of the definition section is negatived.

The right of the tenant to compensation is dealt with in s. 1 of the Act, which gives the tenant, on quitting his holding at the determination of his tenancy, the right to obtain from the landlord as compensation the value of improvements. Now it seems impossible to suppose that the word "landlord" in this section does not include the personal representatives of the landlord, or to suppose that, if the landlord were tenant for life and died suddenly, a tenant who had not already given notice of claim under s. 7 would lose his statutory right to compensation. Then take s. 6, which requires that in the ascertainment of the amount of compensation under the Act payable to the tenant there shall be taken into account in reduction thereof any sums due to the landlord in respect of rent. It seems clear that in this section "landlord" must include the personal representatives of the landlord; moreover, it seems clear that a tenant, or at all events a tenant who has made a claim under s. 7, has a right to enforce his claim against the executors of the landlord; for the final clause of s. 61 provides that "the designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements."

Now, in my opinion, we ought not, unless the words compel us to do so, to construe the Act which imposes on landlords this liability so as not also to extend to them, or those who represent them, the correlative right of charging this compulsory expenditure on the land, and thus on those who have the benefit of the expenditure. It is said that the apparent injustice of so construing the Act as not to give the executors this power, disappears in face of the consideration that the legislature may have intended not to charge the land unless the landlord, by application to the county court, declared his option so to charge it, because, it is said, it might well be that the landlord

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preferred his heir-at-law to his next of kin. It seems to me that this improbable event weighs as nothing against the injustice which will be done in the necessarily frequent cases where the landlord either has not the opportunity, or from carelessness neglects the opportunity, of charging the land. Primâ facie, it must be supposed that the legislature intended that those who got the benefit of the expenditure should bear the burden.

There is another point of view which seems to me to lead to the same conclusion: the definition of "landlord" is "any person for the time being entitled to receive the rents and profits of any holding." Now it may be that this definition may be so read as to include as persons "for the time being entitled to receive the rents and profits of any holding" those who are entitled to receive rents and profits in arrear or unpaid at and after the determination of the term. Indeed, the whole scope of the Act goes to shew that the final account is not to be taken till after the determination of the term; for there are items of charge and deduction in s. 6 which can hardly be arrived at until after the determination of the term. Moreover, it can hardly be that the legislature intended that a tenant who had suffered the term to expire without making a claim under s. 7 should lose the benefit of that section, or, indeed, of any part of the Act, and it is to be observed that, if the term "landlord" is only to apply so long as the term subsists, the determination of the term, as well by the death of the tenant for life or cestui que vie as by effluxion of time, will oust the operation of the statute.

I have only to add that in the Agricultural Holdings (Scotland) Act, 1883—which, except that it substitutes sheriff for county court judge, and Scotch law terms for English law terms, seems generally couched in the very words of the English Act—"landlord" is made by the definition clause to include executor and administrator.

In my opinion, this is done not to difference the Scotch law from the English, which was passed in Parliament a few days previously, but to clear up a possible doubt which might arise on the wording of the English Act. I think this, because it is

difficult to conceive any reason why it should be just in Scotland that the executors should have the power of charging the land with money which they are compelled to spend out of their testator's estate for the benefit of the land, and not just in England that they should have the same power.

CAVE, J. This is an appeal from an order of a county court judge refusing to give the appellants a charge under s. 29 of the Agricultural Holdings (England) Act, 1883.

At the commencement of 1890 a Mr. Gough was tenant for life of the property in question, which was then in the possession of a tenant whose tenancy was about to expire at Lady Day of that year. The tenant had duly given notice to Mr. Gough, his landlord, of his intention to make a claim for compensation under the Act, and on April 5, 1890, by a valuation made by consent, the amount of the compensation was assessed at 35*l.* On April 8 the landlord died, leaving the 35*l.* unpaid. On April 24 his executors paid the amount, and then applied to the county court for a charge on the holding, which the county court refused to give, on the ground that the executors could not bring themselves within the Act. Sect. 29 of the Act, omitting immaterial parts, provides that "a landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, shall be entitled to obtain from the county court a charge on the holding to the amount of the sum so paid." Now, in this case the applicants were, not the landlord, but his executors, and it is necessary therefore to turn to the interpretation clause to see if that throws any light on the question. Sect. 61 enacts that "'landlord,' in relation to a holding, means any person for the time being entitled to receive the rents and profits of any holding." Now, the applicants never were entitled to receive the rents and profits of this holding; for, on the death of Mr. Gough, on April 8, the person for the time being entitled to receive the rent of this holding was his granddaughter, who became tenant in fee on his death. At the end of s. 61, it is provided that "the designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this

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Act in respect of compensation for improvements." In my judgment, this part of the interpretation clause made Gough the landlord, and his tenant the tenant after March 25, notwithstanding that the tenancy determined on that day. I do not see how it can possibly apply to the executors, and it seems to me to afford an argument against them, as tending to shew that Mr. Gough himself might have ceased to be within the definition of the word landlord given in the earlier part of the section, if this clause had not been inserted. If, but for this clause, Mr. Gough would not, after the 25th of March, have been within the definition of landlord, merely because he still remained entitled to receive the rent which accrued due on that day, then à fortiori his executors would not come within that definition.

If this is the natural meaning of the language, is there anything so repugnant to natural justice in the result as to force us to the conclusion that this could not have been the intention of the legislature? Before the passing of the Act of 1883, the executors of a tenant for life, who had been compelled to pay compensation to the tenant according to the terms of the lease, or the custom of the country, under such circumstances as existed here, could not have recovered any part of that sum from the remainderman, but the whole must have come out of the personal estate of the tenant for life. It is true that the Act gives the tenant more ample compensation than he could have obtained before, and makes that compensation payable by the landlord, who may be only a tenant for life; but in return it gives the landlord power to obtain a charge, if in his discretion he thinks fit to do so, not only for that compensation which he is compelled by the Act to pay, but also for that which he would even before the Act have had to pay under the terms of the lease or the custom of the country. Is there anything unreasonable or contrary to natural justice in confining the option to take a charge to the landlord himself, and in not extending it to his executors, who would be bound, or might naturally be expected, to decide in favour of taking a charge, while the landlord himself might be quite as likely to decide in favour of the heir or remainderman as not. I do not say it would be unreasonable to

extend the option to the executors; it is enough for my purpose that it is not so repugnant to natural justice to confine it to the landlord personally, as to compel us to put a non-natural interpretation on the words of the statute. Whether the one view should be adopted, or the other, might very well depend on the prior history of the nation, and of its dealings with landed property, and also on the economical views generally prevalent in the nation. It is remarkable that in another Act passed on the same day, but confined to Scotland, the opposite view of extending the option to the executors of the landlord did prevail; and the very fact that the legislature, when it was minded so to extend the option, knew how to express its meaning, is a strong argument against giving to quite different language in the English Act the same interpretation as would be given to the language of the Scotch Act. Nor can it be said that the matter was passed over per incuriam, for when in s. 61 the legislature comes to define the word tenant it expressly includes the tenant's executors, and, to shew that this right to compensation was not forgotten, and to preclude the contention that the general inclusion of executors would not extend to such a right, it expressly provides that "the right to receive compensation in respect of any improvement made by a tenant shall enure to the benefit of such executors, administrators, and assigns, and other persons as aforesaid." It may be said that this construction prevents the landlord from exercising his option, if he should die just after the determination of the tenancy, and before he has had time to apply to the county court for a charge; but I should wish to guard against any such construction being inferred from my judgment. It is not necessary to decide the point here; but I should like it to be understood that I am not at present prepared to hold that the executors could not succeed in obtaining a charge, if they could shew that their testator in his lifetime had unequivocally declared his intention of applying for one—as, for instance, by giving the remainderman notice of the tenant's claim—with a view to the remainderman being represented on the arbitration provided by the Act, and protecting his interests against the claim of the tenant. Nothing of the kind is suggested to have taken place here, and, for the reasons above set

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forth, I am of opinion that the learned county court judge was right, and that this appeal should be dismissed.

Appeal dismissed. Leave to appeal.

W. A.

The executors appealed.

June 26. *H. F. Lawes*, for the appellants. The executors are entitled to the charge which they claim. If they do not come within the definition of "landlord" contained in s. 61 of the Act, they come within the final clause of that section. (1) The

(1) By s. 1 of the Act: "Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the first schedule hereto, he shall, on and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant."

By s. 29: "A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, or in respect of compensation authorized by this Act to be substituted for compensation under this Act, or on expending such amount as may be necessary to execute an improvement under the second part of the first schedule hereto, after notice given by the tenant of his intention to execute such improvement in accordance with this Act, shall be entitled to obtain from the county court a charge on the holding, or any part thereof, to the amount of the sum so paid or expended.

"The Court shall, on proof of the payment or expenditure, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, make an order charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest and by such instalments, and with such directions for giving effect to the charge, as the Court thinks fit.

"But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case after the time when any such improvement will in the opinion of the Court, after hearing such evidence (if any) as it thinks expedient, have become exhausted.

"The instalments and interest shall be charged in favour of the landlord, his executors, administrators, and assigns."

By s. 61: "In this Act (inter alia)—

"'Contract of tenancy' means a letting of or agreement for the letting land for a term of years or for lives, or for lives and years, or from year to year.

"proceedings" are not "concluded" till the charge is declared by the Court, and, therefore, until then the designation of "landlord" continues to apply to the executors, who are parties to the proceedings. Under s. 24 of the Act they were bound to pay the compensation to the tenant, and they have done so. If the testator had in his lifetime commenced proceedings to obtain a charge, and had died before the charge had been declared by the Court, surely his executors would have been entitled to obtain the charge; and why should it make any difference that he died before the payment had been made to the tenant? It would be a strange result if, by reason of the accident of his death, his estate must bear the compensation, when it can derive no benefit from the improvements. It may indeed be said, that the executors come within the definition of "landlord," as being "for the time being entitled to receive the rents and profits" of the holding. Under s. 4 of the Apportionment Act, 1870, they were entitled to receive the apportioned part of the rent down to the death of the tenant for life, and they did receive it from the incoming tenant.

McCall, Q.C., and *Garland*, for the remainderman. By s. 4 of the Agricultural Holdings Act, 1875, which was repealed by the Act of 1883, the word "landlord" was defined as including the executors of a landlord. The executors are omitted from the definition of "landlord" in the Act of 1883. The final clause of

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"'Landlord,' in relation to a holding, means any person for the time being entitled to receive the rents and profits of any holding.

"'Tenant' means the holder of land under a landlord for a term of years or for lives, or for lives and years, or from year to year.

"'Tenant' includes the executors, administrators, assigns, legatee, devisee, or next of kin, husband, guardian, committee of the estate or trustees in bankruptcy of a tenant, or any person deriving title from a tenant; and the right to receive compensation in respect of any improvement made by a tenant shall enure to the benefit of such executors, administrators, assigns, and other persons as aforesaid.

"'Holding' means any parcel of land held by a tenant.

"The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements or under any agreement made in pursuance of this Act."

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s. 4 of the Act of 1875 is similar to the final clause of the Act of 1883.

[KAY, L.J. In the Act of 1875 the words were "parties to the contract of tenancy"; in the Act of 1883, only the word "parties" is used. It must mean parties to the proceedings.

LORD ESHER, M.R. The words which limit the meaning of "parties" have been omitted.]

The landlord has an option whether he will ask for the charge; he may or he may not choose to benefit his personal representative at the expense of his heir or of the remainderman. This is a reason why the landlord's executors should be excluded from the definition of "landlord."

The meaning of the final clause of s. 61 is that, if the person who was "landlord" at the commencement of the proceedings ceases to be landlord before they are concluded, he is to continue "landlord" for the purpose of those proceedings until they are concluded. The proceedings to obtain a charge are quite separate and distinct from those to obtain compensation.

LORD ESHER, M.R. The Act is not clearly expressed; we must endeavour to find out what its meaning is. In my opinion the appellants cannot succeed, unless they can bring themselves within the final clause of s. 61. I agree with Vaughan Williams, J., that primâ facie the definition of "landlord" in that section shuts out the executors of a landlord. The definition says that "landlord" "means" (it does not say "includes") "any person for the time being entitled to receive the rents and profits of any holding." I doubt whether the executors of a landlord would come within that definition. It is a hard and fast definition, and the result is that you cannot give any other meaning to the word "landlord" in the Act than that which is mentioned in the definition. It is quite different in the case of a tenant. There the draftsman has dropped the word "means," and has said that "tenant" "includes the executors, administrators, &c., of a tenant"—that is, the word as used in the Act includes the ordinary meaning, and adds something to it. In the case of a landlord, on the contrary, the word can have no other meaning than that which is stated in the definition. Then we come to

another clause—the final clause—of s. 61, which would be idle if the words "landlord" and "tenant" in it are to be restricted to the meaning given in the prior definitions. That clause provides that "the designations of landlord and tenant"—that is, the words used in the Act to designate those persons—"shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements." There is, therefore, a time when the terms "landlord" and "tenant" are not to be strictly construed according to the prior definitions, but the designations are to continue to apply to the parties, although the definitions would not apply. "To the parties"—the question is whether, in such a case as the present, that phrase will include the executors of a landlord who was tenant for life of the property. The proceedings under the Act were commenced during the life of the tenant for life, and they were to go on till they were concluded. While they were going on the tenant for life died. Were the proceedings concluded by his death? No, they went on. His executors had to pay the sum awarded for compensation, and they became parties to the proceedings. Does the word "parties" in the final clause of s. 61 mean the "parties to the original contract of tenancy" only? Mr. McCall argues that it does. But those are the words used in s. 4 of the Act of 1875, and that Act has been repealed and replaced by the Act of 1883. Sect. 4 of the Act of 1875 says that "the designations of landlord and tenant shall, for the purposes of this Act, continue to apply to the *parties to a contract of tenancy* until the conclusion of any proceedings." Sect. 61 of the Act of 1883 says, "apply to the parties," omitting the words "to a contract of tenancy." Why was this done? The phrase used in the Act of 1875 was a more limited one, and applied to a more limited class. The word "parties" is now left at large, and we must give effect to the alteration; and we can do that only by saying that the word "parties" includes a larger number of persons than "parties to a contract of tenancy." To whom does the word "parties" in the later Act apply? It must have some limitation, and I think it must mean parties to the proceedings which are initiated, and are to be carried out, under the Act. It will, therefore, include the

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executors of a landlord when they have become parties to the proceedings. Although the executors of a tenant for life do not come within the definition of "landlord," yet, if a question of compensation has arisen, the term "landlord" is to continue to apply to the parties to the proceedings until the conclusion of the proceedings. According, therefore, to the ordinary rules of construction, this will bring in the executors of a tenant for life who has died during the pending of the proceedings, and in this way justice will be done, and an injustice, which one of my learned brethren has characterized as both monstrous and senseless, will be avoided. By this interpretation of s. 61 we shall be doing plain and simple justice; and I think this is what the legislature must have intended. I, therefore, agree with the judgment of Vaughan Williams, J., rather than with that of Cave, J.

BOWEN, L.J. I am of the same opinion, and I should add nothing but for the difference in the judgments of the Divisional Court. I think that, notwithstanding the obscure language of the Act, we are driven to the conclusion which the Master of the Rolls has expressed, by a careful consideration of what the legislature must have intended, as their intention is to be gathered from the Act itself. The first question is, whether the executors are included in the definition of "landlord" which is given in s. 61. I doubt whether the provisions of the Apportionment Act are sufficient to bring them within that definition, and I express no opinion about it. But, assuming that the executors are not within the definition of "landlord," there is an important clause at the end of s. 61 which may bring them in. It says that "the designations of 'landlord' and 'tenant' shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements." What is the meaning of the word "parties" there? The counsel for the remainderman says it means only those persons who once stood in the relation of landlord and tenant. We must see whether that construction does not lead to a monstrous result. There is a chapter of the Act (ss. 7 to 28) which is headed "Procedure," and elaborate machinery for the ascertainment of

compensation is provided there. Is it conceivable that the whole of this machinery is to become useless, even if it is set in motion during the life of the landlord, in the event of the death of the landlord? There is nothing to shew that his executors will not be bound, in case an agreement as to the amount of compensation is come to between him and the tenant before his death. It is clear that his executors must pay the amount agreed upon. It is admitted that the tenant does not lose his right against the landlord, if he ceases to be landlord otherwise than by death. Is the tenant to lose his right if the landlord dies? That would be a senseless result. Surely the clause means that the words "landlord" and "tenant" are to continue to apply not only to those who were "landlord" and "tenant," but have ceased to be so, but also to those who have succeeded them in the proceedings. This conclusion is fortified by a reference to the previous legislation. Sect. 4 of the Agricultural Holdings (England) Act, 1875 (38 & 39 Vict. c. 92), provides that "landlord" or "tenant" includes ". . . the executors, administrators, assigns . . . . of a landlord or tenant," and by the last clause of that section, "The designations of landlord and tenant shall for the purposes of this Act continue to apply to the parties to a contract of tenancy until the conclusion of any proceedings taken under this Act on the determination of the tenancy." The Act of 1883 has altered this. It has limited the scope of the definition of the word "landlord" in such a way as to cut out the executors of a landlord altogether. But, inasmuch as an anomaly would be created, and the machinery of the Act would be rendered abortive, in case of the death of the landlord, the final clause of s. 4 of the Act of 1875 has been altered by substituting the word "parties" for the words "parties to the contract." My conclusion is that the word "parties" must have been intended to bear a wider meaning in the Act of 1883, and that it was expressly intended to include such a case as the present.

KAY, L.J. The scheme of this Act and of the Act of 1875 is to give to a tenant of agricultural land an advantage which he did not previously possess—to enable him to charge against his landlord the cost of improvements made by him, and which,

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are unexhausted at the end of the tenancy. This is a great benefit to the tenant. Under the Act of 1875 the landlord and the tenant were allowed to contract themselves out of the Act. The Act of 1883 goes further, and by s. 55 expressly makes void any contract by a tenant by which he is deprived of his right to claim compensation under the Act. The provisions of the Act are made absolutely binding on the landlord, and he is compelled to pay compensation to the tenant for unexhausted improvements. In the present case the landlord was a tenant for life, and the lease expired in March, 1890, just before his death. In January, 1890, the tenant served notice on the landlord of his claim for compensation. The amount due to the tenant was ascertained to be 35*l.* All this was done during the life of the landlord. He died before the compensation was paid to the tenant, and there can be no doubt that his executors were bound to pay it to the tenant, and they have done so. Under s. 29 of the Act the executors, if they can be brought within the term "landlord," became, upon paying the 35*l.*, entitled to a charge on the holding for that amount. They paid the money in respect of unexhausted improvements which would benefit the land of the remainderman, and from which the estate of the tenant for life would derive no benefit whatever. Can the legislature have intended that the landlord, if he is living, should obtain a charge on the land for the amount which he has paid, but that, if he is dead, his executors should be compelled to pay the money, but should not be entitled to a charge on the land in respect of a payment which benefits the remainderman's land, but produces no benefit whatever to the estate of their testator? I cannot conceive a more senseless injustice, and it seems to me incredible that this should have been the intention of the legislature. The strongest argument in support of this construction of the Act is that based on the definition of the word "landlord." I agree that the executors are not "entitled to receive the rents and profits of the holding," though they may be entitled to receive an apportioned part of the rent up to the date of the landlord's death. The argument is, that in the Act of 1875 the word "landlord" is defined so as to include the executors of a landlord, while in the Act of 1883 the word "executors" has been omitted

from the definition of "landlord," though the definition of "tenant" still includes the executors of a tenant, and it is said there must have been some reason for this alteration. But there is another difference between s. 4 of the Act of 1875, and s. 61 of the Act of 1883. The final clause of s. 61 is like, but, at the same time, very unlike, the final clause of s. 4. In s. 61 the word "parties" only is used, the words "to a contract of tenancy" being omitted. Is not the reason for this to be found in the fact that, in the definition of "landlord" in s. 61, the executors of a landlord have been omitted? Is it not the intention to include the executors for some purposes, though they are not "landlords" within the definition? This construction will make the whole of the Act plain. I think the meaning is, that the designation of "landlord" shall continue to apply to the executors of a landlord so long as any proceedings taken under the Act in respect of compensation are pending. To say that the term "landlord" shall in all cases include the executors of a landlord might lead to difficulties, because in many cases the interest of the landlord ceases on his death. But to say, that the designation of landlord shall continue to apply to the parties until the conclusion of pending proceedings, is reasonable and right, and makes the Act intelligible. The proceedings are not determined by the death of a landlord who is tenant for life; they continue until the application for a charge on the holding has been heard and decided. The right to a charge arises only on payment by the executors. I think the present case is within the words as well as within the spirit of the Act. The executors are parties to a proceeding taken under the Act, and the designation of "landlord" continues to apply to them until the proceeding is at an end, and consequently they are entitled to a charge for the compensation which they have paid. In this way the intention of the legislature will be carried out, and the extraordinary result which would otherwise occur will be avoided.

Appeal allowed.

Solicitors for executors: *Pilgrim & Phillips, for H. F. Poynton, Bristol.*

Solicitors for remainderman: *Moon, Gilks, & Moon, for J. W. B. Leach, Martock.*

W. L. C.

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[IN THE COURT OF APPEAL.]

HARRISON, AINSLIE & CO. *v.* LORD MUNCASTER.

Landlord and Tenant—Covenant for Quiet Enjoyment.

The defendant leased to the Parkside Mining Company a mine for the purpose of being worked as an iron mine; subsequently, he leased to the plaintiffs an adjoining mine for the same purpose, the lease to the plaintiffs containing a covenant for quiet enjoyment of the mine, "without any interruption or eviction by the lessor, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under him." The Parkside Company, while properly working their mine under the terms of their lease from the defendant, struck a "feeder," with the result that a large body of underground water, the existence of which was unsuspected and the nature of which was uncertain, flooded their mine, and rising in the levels found its way through a natural fissure in the limestone rock into the plaintiffs' mine, which was on a higher level, and caused considerable damage. The plaintiffs having brought an action to recover damages for breach of the covenant for quiet enjoyment:—

Held, that the interruption to the working of the plaintiffs' mine by the irruption of water not having been caused by any direct act of interruption, or by any act the consequences of which either were foreseen or ought to have been foreseen by the defendant at the time when the covenant was entered into, was not an interruption within the meaning of the covenant, and that the defendant was not liable.

APPEAL from a judgment of Day, J., without a jury, in favour of the defendant.

The action was brought to recover damages for breach of a covenant for quiet enjoyment contained in a lease from the defendant to the plaintiffs, and the facts were shortly as follow. On June 1, 1886, the defendant leased to the plaintiffs for a term of thirty-seven years certain iron mines in the manor of Pennington; the lease contained the usual powers to work iron mines and a covenant for quiet enjoyment in the following terms: "And the said Baron Muncaster doth hereby declare and agree that the said lessees, their executors and administrators paying the rents, royalties, and sums of money hereby reserved and observing and performing the lessees' covenants herein contained, shall peaceably and quietly hold and enjoy the premises hereby demised for the term hereby granted, without any interruption or eviction by the said Baron Muncaster, his heirs or assigns, or any other person or persons claiming or to claim, by

from or under him." In 1871, the defendant had granted a lease of certain other mines immediately adjoining the plaintiffs' mines, to the Parkside Mining Company, which lease was still subsisting at the time when the events happened out of which the action arose.

In July, 1889, the Parkside Company, in the course of working their mine, tapped what was called a feeder, the effect of which was to release a large quantity of underground water, the existence of which had never been suspected, and the nature of which was wholly uncertain, it being admitted at the trial that it was impossible to determine whether the water was an underground reservoir or an underground stream. The water having made its way into the mine of the Parkside Company rose in the levels of that mine, drowning it out, and found its way through a natural fissure in the limestone rock into the plaintiffs' mine, which was flooded, and in consequence serious damage was suffered by the plaintiffs before the water could be pumped out of their mine. The natural dip of the land and percolation of water was from north to south, in other words, from the plaintiffs' mine to the Parkside mine, and the water in fact rose against the dip of the land and flowed from the lower mine into the higher one. It was admitted that there was no negligent working of the Parkside mine, and that the "pecking" which caused the inrush of water was done in the ordinary course of proper mining, and not in breach of any duty owed by the Parkside Company to the defendant, their landlord.

At the trial at Lancaster, Day, J., held, that there had been no breach by the defendant of his covenant for quiet enjoyment, and gave judgment for the defendant. The plaintiffs appealed.

Sir H. Davey, Q.C., Bigham, Q.C., and *Joseph Walton*, for the plaintiffs. The covenant for quiet enjoyment is wholly independent of any question of negligence; it is an absolute covenant against any interruption by the defendant, or those claiming under him. If the defendant authorized the Parkside Mining Company to disturb the strata in order to mine for ironstone, and the result of that disturbance was the irruption of water into the mine of the plaintiffs, that was a disturbance or interruption

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for which the defendant is liable under his covenant. The Parkside Company did nothing that was not authorized by their lease, and the case of *Sanderson* v. *Mayor of Berwick-on-Tweed* (1), which was a case of disturbance of an easement, shews that though the landlord would not be liable for the tortious act of his tenant in making an improper user of the demised property, he would be liable if the user by the tenant were within his authority. The principle on which his liability rests is clearly stated by Fry, L.J.: "It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

[LORD ESHER, M.R. The expression in that judgment "claiming under him," must be restricted in its meaning to claiming a right under him to do the particular act complained of.]

The effect of the covenant is that the defendant has absolutely warranted the plaintiffs against any acts, and the consequences of any acts, done by him, or by his authority, which would disturb the enjoyment by the plaintiffs of their mine. The act authorized by the defendant was mining for ironstone in adjoining land and disturbing the strata; the consequence of the act was to let out the underground water with the effect of disturbing the plaintiffs' enjoyment. It is none the less a breach of a covenant for quiet enjoyment if the act is authorized, although the consequence cannot be foreseen; if the defendant wished to protect himself against an unforeseen consequence, he should have qualified or restricted his covenant. The escape of water was the natural consequence of what the Parkside Company did, and ought to have been foreseen by the defendant.

[They also cited *Dennett* v. *Atherton* (2); *Robinson* v. *Kilvert* (3); *Shaw* v. *Stenton.* (4)]

Gully, Q.C., C. Tyrrell Giles, and *F. H. Mellor,* for the defendant.

(1) 13 Q. B. D. 547.
(2) Law Rep. 7 Q. B. 316.
(3) 41 Ch. D. 88.
(4) 2 H. & N. 858.

The act which caused the interruption was the flow of water, not the mere pecking in the ordinary course of proper mining, and that was not done by any person claiming under the defendant within the meaning of this covenant. An interruption within the meaning of the covenant is either a direct act of interruption, or an act which, though not an interruption in itself, is of such a nature that its consequences either were or ought to have been foreseen. It could not have been foreseen that the result of properly working the Parkside mine would be to let loose into a mine on a higher level, and through a fissure which no one knew of, a body of water the existence of which was absolutely unsuspected by anybody. The occurrence was a pure accident, and in none of the cases cited was there an accident in any sense of the word. A covenant for quiet enjoyment is not an absolute warranty that nothing will be done on the adjoining land of the lessor which will interfere with the working or enjoyment of the demised property.

Bigham, Q.C., in reply.

LORD ESHER, M.R. I am of opinion that this appeal must be dismissed. The action is for breach of a covenant for quiet enjoyment of a mine leased by the defendant to the plaintiffs, the mine being an iron mine, which was leased for working as an iron mine in the ordinary way. Prior to that lease to the plaintiffs the defendant had granted a lease of the adjoining mine to the Parkside Mining Company for the same purpose, the working of the mine. The Parkside Company worked their mine, and, in the course of that working, they naturally pecked out, as it is called, a part of the ore, and in so doing they came upon water which was not artificially put there, but was there naturally. How the water came there, and in what way it ran, is absolutely unknown. It may have been the result of percolation; it may have been what is called an underground river—that is, an underground stream; or it may have been an underground lake. By pecking the strata that water came through, and it did a very unusual thing—a thing which cannot be said to be naturally impossible, because it was done in this instance—the water rose to a considerable height in the Parkside mine from the place

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where it broke it, and then it found a fissure through which it flowed into the plaintiffs' mine, the result being that both mines were swamped. The plaintiffs say that this amounts to a breach on the part of their lessor of his covenant for quiet enjoyment.

Now, a covenant for quiet enjoyment is, and always has been, framed in words so large that it might include every interruption to a beneficial enjoyment of the thing demised, whether accidental or wrongful, or in whatever way the interruption may be caused, even if it be caused by some extraordinary occurrence of nature; the words are large enough to embrace all these cases. From the time that the effect of that covenant was first discussed before the Courts until now, it has been held that it does not bear that large meaning, and that it does not embrace the case of eviction by a title paramount. It has been construed to mean that the covenantee shall have quiet enjoyment of the thing demised, not interrupted by any act of the lessor, or of any person authorized by him; to that it has hitherto been confined. Therefore, in an action upon this covenant, the plaintiff does not prove his case by merely proving an interruption of his enjoyment; he must further prove that it has been interrupted by an act of the defendant, the covenantor, or by the act of some person authorized by him.

In this case the first question is, was the enjoyment of the plaintiff's mine interrupted, in the sense in which that word is interpreted in the covenant? I have no doubt that it was. Formerly it was thought that a covenant for quiet enjoyment only applied to an interference with the title of the covenantee, but upon more careful consideration it was held that it applied to an interference with the enjoyment of the thing demised; and it seems clear that there may be an interference with the enjoyment of property without any interruption to or interference with the title to it. The case of *Sanderson* v. *Mayor of Berwick-on-Tweed* (1) is a clear authority that the interruption contemplated by the covenant need not necessarily be an interference with the title, but may extend to an interference with the enjoyment; and that decision, interpreted in that way, was, in my opinion, authorized by the case of *Shaw* v. *Stenton* (2); but it

(1) 13 Q. B. D. 547. (2) 2 H. & N. 858.

goes no further. In the first-named case Fry, L.J., who gave the judgment of the Court, has stated an abstract proposition, and has used words which, if regarded merely as the statement of an abstract proposition, would carry the liability of the person giving such a covenant to a great length; but looking at the words used, and bearing in mind what was the subject-matter of that particular case, it will be seen that our decision in the present case is entirely consistent with, and within the meaning of, the language used in that judgment. "It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted." That is the first proposition, and in this case I should determine that question of fact in favour of the plaintiffs; for to swamp a man's mines so that he cannot work them, is certainly to interrupt the enjoyment of them. The judgment goes on, "And where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor"—that is, by the acts of the person who has entered into the covenant—"or those lawfully claiming under him." I pause there for a minute. Not only must the enjoyment be interrupted, but it must be interrupted by the acts of the lessor, or those lawfully claiming under him: the last words require some definition and limitation. Considering what was being discussed, I have no doubt that the proper meaning of those words is, "by the acts of the lessor, or of those claiming under him the right to do the acts which caused the interruption." In this case, what was the act which caused the interruption? The act which is relied upon is pecking through the strata, and so letting the water come through, and that was not an act done by the lessor; it was done by a person claiming through the landlord a right to do it, and, therefore, if it can be said that that act was, within the meaning of this covenant, the cause of the interruption, then the plaintiffs will succeed. But is that act, within the meaning of this covenant, the cause of the interruption? That which caused the interruption was not the pecking through of the strata. The immediate cause of the interruption was the water coming in and overflowing the mine. The question, therefore, comes to this—was the irruption of the water either the act of the defendant (which it certainly was

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not), or the act of a person authorized by him to let that water in? It is rather nice to say there is a distinction between an act and its consequences; but the question does arise whether there is a difference between the act and its consequences within the meaning of this covenant. Now, how are we to construe a covenant in which the words are large enough to include everything, but in which they must have some restriction, if they are not to lead to absurdity? They are restricted, as we have seen, to acts done by the defendant, or by a person claiming to do those acts under him. On principle, a covenant can only be operative with regard to a thing which is contemplated by both the parties at the time it is entered into, and its interpretation does not depend on the meaning which one of them had, but upon the meaning which both of them must have had. If they use words which are too large, how is their real meaning to be got at? We must not go contrary to the words; but we may say this (and it always is said), the parties must, when they used those words, have intended them to include all circumstances which they actually contemplated at the moment, and which it can be shewn that they did then contemplate, or which, if they had thought properly about the matter, they ought to have contemplated. Beyond that the meaning of the covenant ought not to be extended. If something has happened, which it is obvious that no person of intelligence could have contemplated, it must be held that they did not contemplate it. We come therefore to this proposition, that the interruption of the quiet enjoyment in such a case as the present must mean an interruption caused either by a direct act of interruption by the defendant himself, or by some act the consequence of which it either was foreseen, or ought, if reasonable care had been exercised, to have been foreseen, would be an interruption. Now, can anybody have supposed, in this case, that this pecking would have caused an irruption of water in the way in which this water came in? That raises a question of fact which we must determine; and it is obvious to my mind that no person of ordinary intelligence, however careful he might be, could have contemplated any such result through the act of pecking. The consequence is not, in the sense in which that phrase has always been used, the natural

result of the act—it is an extraordinary result; it is so extraordinary a result that no man could have foreseen it; and, that being so, it would be contrary to the truth to say that either the plaintiffs or the defendant could have contemplated the result as the result of the act which is complained of. If it is true that neither of them could have contemplated the result, neither of them agreed or covenanted with regard to that result, and that result is not within the terms of the covenant, and therefore the covenant is not broken by that result of the act. The case of the plaintiffs therefore fails, and the judgment of Day, J., must be affirmed.

BOWEN, L.J. I am of the same opinion. The defendant has guaranteed (to use a popular phrase), the plaintiffs against any interruption of their enjoyment by persons claiming under him; and there is no doubt that the Parkside mine is held by persons claiming under the defendant. What we have to decide is whether what happened in this particular case amounts to an interruption of the enjoyment of the plaintiffs' mine within the meaning of this covenant. What happened was that the Parkside mine while it was being worked, flooded the mine of the plaintiffs. Some of the rock was pecked away, and a large quantity of water which was either a natural reservoir unknown to the world or else an underground stream made its way into the plaintiffs' mine. What was the act done? The act done was the pecking away of the limestone rock, and it was followed by a flow of water into the plaintiffs' mine. It was said ingeniously by the counsel for the plaintiffs that there was an act done here by the lessees of the defendant, which was the pecking of the rock, and that that act was a perfectly foreseen occurrence; that the defendant, when he made the lease, must have known that the mine would be worked and that the limestone would be pecked, and that although the consequence which followed was unforeseen, yet the act itself was foreseen. They contended that the consequence, although it might not have been foreseen, was a necessary consequence under the circumstances, because the limestone could not be pecked away in this particular part of the mine without the consequences following

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which did follow; and they said further that a man must be held to be liable for the direct and necessary consequence of what he did. The fallacy of that mode of putting the case lies in the assumption that the interruption, which is the only thing against which the defendant covenanted, consisted of the pecking of the limestone. That is not what interrupted the enjoyment of the neighbouring mine of the plaintiffs'; it was the flow of the water into the mine which alone constituted the interruption; and unless that flow of water can be made out to be an interruption by the defendant, or by persons claiming under him, the defendant must succeed. Was then the flow of water which is an interruption of the enjoyment of the plaintiff's mine caused by the Parkside mine within the meaning of the covenant? In one sense I quite agree that it is caused by the Parkside mine, because it is caused by the act which the Parkside mine did. But is it caused by it in the sense that this covenant intends to be affixed to the term? It is necessary to draw a distinction between the act and its consequences; the defendant did not authorize the consequences, he authorized the act; and, unless, as I said, the flow of the water, which was the consequence, can be shown to amount to an interruption by the Parkside mine, the defendant must escape.

It seems to me, therefore, that we are driven to a pure question of construction of the meaning of this covenant for quiet enjoyment which is in a very usual form; and it must be remembered that these covenants for quiet enjoyment must be construed with reference to the transaction, which is one of lease, and so as to give effect to what may be reasonably supposed to be intended by the lessor and lessee. Suppose there were an implied and not an express covenant for enjoyment, the extent of its operation would be measured by what both the parties must have intended should be the minimum effect given to the transaction and the minimum security given for the possession which was secured by the lease. When, however, there is an express covenant for enjoyment, although it may contain words which are not necessary to the scope of the lease, and which may go beyond or fall short of what the covenant for quiet enjoyment may be presumed to be intended to include, we must still

remember the nature of the subject-matter with which we are dealing. It is a transaction between lessor and lessee, and we must not give to a covenant for quiet enjoyment, in the absence of express words, such an interpretation as would make it wholly unreasonable and would make it give to the lessee a security out of all reason and beyond all possible intention of the parties. The covenant is not an absolute warranty for quiet enjoyment, as has been shewn in *Dennett* v. *Atherton* (1), where the Exchequer Chamber held that a covenant for quiet enjoyment did not imply a warranty that the land was capable of being used for any purpose not expressly excluded. In the same way, applying a similar line of thought, it seems to me that it would be unreasonable to suppose that a covenant for quiet enjoyment, in the absence of express words, would make a landlord liable for every possible consequence which might happen from any acts done under colour of his title by any person who claimed under him. I think it would be unreasonable to hold that it amounted to a warranty that nothing should happen which would interfere with the quiet enjoyment of the lessee, if such event could possibly be traced to any lawful act of the lessees of the defendant or those claiming under him.

To go back to the words of the lease. The interruption, as I have said, was the flow of the water, was it caused by the Parkside mine within the meaning of this covenant? It seems to me that we must confine this covenant within reasonable limits. I think that an interruption under such a covenant is not caused by the lessor or by those claiming under him, unless it is either a direct act of interruption, or unless it is some act of which it either was foreseen or ought by reasonable care to have been foreseen that the consequence in the particular case would be an interruption. On these grounds, which, I think, are the grounds upon which Day, J., based his judgment in the Court below, I think that this judgment ought to be affirmed.

With regard to the case of *Shaw* v. *Stenton* (2), I need only say that it seems to have been treated from first to last as if it were admitted that what took place was the direct act of the landlord, and no point was made that it involved a consequence which

(1) Law Rep. 7 Q. B. 316. (2) 2 H. & N. 858.

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could not be foreseen at the time; and, on that ground, I think that there is nothing in that decision which is in the least inconsistent with the judgment we are now pronouncing. With regard to *Sanderson* v. *Mayor of Berwick* (1), it seems to me that the passage in the judgment which has been so often referred to must be read in the way in which the Master of the Rolls has read it, and I have no doubt that that was what the Court of Appeal meant. There is nothing at all in *Dennett* v. *Atherton* (2) which is inconsistent with that case, if regard be had to the fact that in *Dennett* v. *Atherton* (2) the purpose for which the land was used was not a purpose which was actually contemplated by the parties at the time the demise was made or was in their necessary contemplation at that time. I agree, therefore, the judgment below ought to be affirmed.

KAY, L.J. I agree. It seems to me very difficult to lay down any general rule for the construction of the covenant for quiet enjoyment, but what we have to do in this case is to determine whether under the particular circumstances of the case there has been a breach of covenant which makes the landlord, the covenantor, liable. What happened was this. The Parkside mine was on the lower slope of the strata, so that, in mining language, the Parkside mine lay to the dip of the plaintiffs' mine, and in working some of the levels in the Parkside mine (the strata in which were sloped downwards from the plaintiffs' mine), the miners tapped some reservoir or flow of water, the nature of which is not known, but which was in such a position, and the pressure of which was so great, that it not merely flooded the Parkside mine, which lay beneath, but also flooded the plaintiffs' mine, which was upon the rise of the strata.

The question is, whether that is a breach of this covenant. I observe that the covenant is an ordinary restricted covenant; it is not an absolute covenant such as is generally put into a mortgage, but is in these terms, that the defendant agrees with the lessees that they, paying their rent and performing the covenant shall peaceably and quietly hold and enjoy the premises thereby demised for the term thereby granted "without

(1) 13 Q. B. D. 547. (2) Law Rep. 7 Q. B. 316.

any interruption or eviction by the said Baron Muncaster, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under him." The Parkside Company undoubtedly are persons who claim under the defendant, because they are his lessees by a previous lease, and it is not disputed that the covenant applies to acts done by them, if those acts are acts of interruption or eviction. Therefore, it seems to me, the question is whether this act which was done in the Parkside mine is an act which amounts to a breach of this covenant. To my mind it does not make much difference, for the purpose of the question we have to decide, that it was done by the Parkside company; it seems to me that it is pretty nearly the same question as if it had been done by the lessor himself, therefore I will assume for the moment that the acts complained of had been done by the lessor himself. It was admitted that what was done by the Parkside Company was done in the course of proper mining, and not in breach of any duty to their landlord, and, therefore, if the landlord had done it he would have been using his own adjoining mine in a lawful and proper manner, getting the minerals without any negligence or default or improper conduct on his part of any kind; nothing like negligence is suggested. What then took place was a most extraordinary event; I will not call it an accident, because I do not want to use at present anything but a neutral word. A supply of water, the nature of which is not known even now, and is only guessed at, was tapped by the workings in the Parkside mine, and it turned out to be of such a peculiar nature that, as I have said, it flooded, not merely the Parkside mine, but the plaintiffs' mine, which was on the rise of the Parkside mine, and rose in both mines so as to completely drown them out. Now, it is quite plain that an occurrence of that kind, which must be very rare, the flooding of a mine on the rise by an influx of water in the mine beneath could not have been foreseen at all. In fact, the accumulation of a body of water in the neighbourhood of the Parkside mine sufficient to cause such a flooding was not a thing which any of the parties to this covenant had the slightest suspicion of, and still less could they have had any suspicion that there could be a sufficient quantity of water not merely stored in the

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neighbourhood of the Parkside mine, but stored at such an elevation, or at such a pressure, that it would flood not only the Parkside mine but the mine in the higher part of the strata. I think we may very clearly and confidently infer what I gather the learned judge in the Court below did, that this occurrence, the consequence of the lawful working of the Parkside mine was an occurrence which was not foreseen and could not have been foreseen, and was not in any sense the necessary or probable consequence of the working of the Parkside mine. Therefore, the sole question we have to determine in this case is: Did this covenant between the lessor and lessee provide against a consequence of that kind, a consequence of the lawful working of the Parkside mine, which was not a necessary or probable consequence of that lawful working, and which was a consequence that they did not and could not foresee? In my opinion, it would be going too far to hold that a covenant of this kind contemplates a consequence such as I have described, or that a consequence of a lawful act by a covenantor, which consequence was not a necessary or probable consequence of what he did, and could not have been foreseen, could be within the scope of this covenant, or, to put it in popular language, to hold that the covenantor meant by this covenant "I will make myself liable for every extraordinary and accidental consequence of any act I may do in the lawful use of my adjoining land." It seems to me that it would not be fair to put that meaning upon such a covenant between parties situated as these are.

I observe that in referring to the case of *Shaw* v. *Stenton* (1), upon which some reliance has been placed, Field, J., in the case of *Anderson* v. *Oppenheimer* (2) uses these words. He is dealing with the case of a flow of water from the cistern which had been provided by the landlord for the use of all the occupants of the house. "The flow of the water into the plaintiff's warehouse to the extent proved is, I think, such an interference with the plaintiff's possession as to amount to an interruption within the meaning of the covenant, and if that interruption had been caused by any wilful act of the defendant: *Andrews* v. *Paradise* (3),

(1) 2 H. & N. 858. (2) 5 Q. B. D. 602.
(3) 8 Mod. 318.

or a probable or necessary consequence of any act of the defendant: *Shaw* v. *Stenton* (1), I should have held that there had been a breach of the covenant for quiet enjoyment." Therefore, it is quite plain that Lord Field understood the decision of *Shaw* v. *Stenton* (1) to be only this, that a consequence of an act by a lessor which was a necessary or probable consequence of that act would, if it interrupted the quiet enjoyment of the lessee, be a breach of the covenant for quiet enjoyment.

Appeal dismissed.

Solicitors for plaintiffs: *Dowson, Ainslie, & Martineau.*
Solicitor for defendant: *H. T. Boodle.*

W. J. B.

[IN THE COURT OF APPEAL.]

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June 12.

THE QUEEN *v.* POWELL AND OTHERS, JUSTICES OF THE PEACE FOR THE HUNDRED OF SWANSEA.

Licensing Acts — Beerhouse — Change of Occupation — Transfer — Grant of Licence to "New Tenant"—Jurisdiction of Justices—9 Geo. 4, c. 61, s. 14.

By 9 Geo. 4, c. 61, s. 14, if the tenant of a beerhouse being duly licensed "shall remove from or yield up the possession of the house specified in the licence . . . it shall be lawful for the justices assembled at a special session, to grant to any new tenant or occupier of any house so becoming unoccupied . . . a licence to sell exciseable liquors by retail . . . provided always that every such licence shall continue in force only from the day on which it shall be granted until (elsewhere than in Middlesex or Surrey) the 10th day of October then next ensuing."

The tenant of a beerhouse, being duly licensed, gave up possession of the house on September 2, 1890, and on September 5, another person entered into occupation as tenant of the house in his stead. The new tenant applied for and obtained at a special transfer session, a licence under 9 Geo. 4, c. 61, s. 14, to himself, as being the "new tenant or occupier of the house having so become unoccupied," for the period ending on October 10, 1890. He did not apply for a renewal of the licence to the general annual licensing meeting on September 27, 1890. The licence having expired, he, on January 3, 1891, applied at another special transfer session for the grant to himself of a licence for the year ending October 10, 1891:—

Held, affirming the decision of the Queen's Bench Division ([1891] 1 Q. B. 718), that the justices had no jurisdiction to grant the application.

APPEAL from a decision of the Queen's Bench Division (A. L. Smith and Grantham, JJ.), (2) refusing the application of one

(1) 2 H. & N. 858. (2) [1891] 1 Q. B. 718.

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Roberts for a mandamus to justices to hear and determine his application for a licence to sell beer.

In August, 1890, Thomas John was the duly licensed tenant of a beerhouse, holding a licence which would expire on October 10, 1890. He was about to give up possession of the house, and, therefore, he did not apply at the general annual licensing meeting of the justices, held on August 30, 1890, for a renewal of his licence. On September 2, he gave up possession of the house; and on September 5, Roberts entered into possession as tenant of the house. On September 27, two sessions of the justices were held; the one being an adjournment of the general annual licensing meeting; the other being a special sessions for the granting of licences under sect. 14 of the Licensing Act, 1828, 9 Geo. 4, c. 61. (1)

Roberts applied to the special sessions for a grant to him, as the new tenant of the house, which had become unoccupied by the removal of John, of a licence to sell beer therein, until October 10, 1890; and a licence was granted to him accordingly. He did not apply at the general sessions for a renewal of John's licence.

On January 3, 1891, another special session was held under sect. 14, and Roberts applied thereat as "new tenant" for another licence, to enable him to sell beer in the house until October 10, 1891. The justices refused this application, on the ground that he was not then a "new tenant" within the meaning of sect. 14, and that, consequently they had no jurisdiction to grant the application.

(1) Sect. 14 provides that if any person duly licensed under the Act, "or the heirs, executors, administrators, or assigns, of any person so licensed, shall remove from, or yield up the possession of the house specified in such licence; or, if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house . . . it shall be lawful for the justices assembled at a special session . . . to grant to any new tenant or occupier of any house so becoming unoccupied . . . a licence to sell exciseable liquors by retail . . . provided always, that every such licence shall continue in force only from the day on which it shall be granted until (elsewhere than in Middlesex or Surrey) the 10th day of October, then next ensuing."

Roberts obtained a rule nisi in the nature of a mandamus to the justices, to hear and determine his application. Upon argument the rule was discharged. (1) Roberts appealed.

Poland, Q.C., and *James Paterson*, for the appellant. If the appellant had waited till after October 10, and had then obtained a licence under s. 14, that licence would have run till October 10, 1891. He might have obtained a transfer of the existing licence, but he did not apply for such a transfer. The grant made on September 27 only provided for the period expiring on October 10, 1890. The appellant is not the less a "new tenant," because he may inadvertently have made a wrong application. The application on September 27 was a mere nullity. The application may be made after the expiration of the old licence: *Reg.* v. *Justices of Liverpool.* (2) The appellant applied under one part of s. 14 for a temporary licence, and he was entitled to apply again under another part for a continuance or renewal of John's licence. The remedy given by s. 14, is commensurate with the evil which it was intended to cure. The appellant was a "new tenant" for the purpose of both applications, which differed entirely. The principle of *Reg.* v. *Justices of Liverpool* (2) applies. Sect. 14 was intended for the benefit of owners. Even if the appellant could have applied to the general session on September 27 for a renewal of John's licence for the term ending October 10, 1891, still he was not bound to do so: *Reg.* v. *Justices of Middlesex.* (3)

David Lewis, for the justices. The argument in support of the rule is based upon the hardship to the applicant; but if there be any hardship it is his own fault. Sect. 14 was intended to prevent hardship to the landlord. John had agreed to give up the tenancy to any nominee of the landlord. Roberts could on October 11 have obtained from petty sessions a grant of a temporary licence under 5 & 6 Vict. c. 44, s. 1. Sect. 14 of 9 Geo. 4, c. 61, must be construed strictly: *Simpkin* v. *Justices of Birmingham.* (4)

Poland, Q.C., in reply.

(1) [1891] 1 Q. B. 718.
(2) 11 Q. B. D. 638.
(3) Law Rep. 6 Q. B. 781.
(4) Law Rep. 7 Q. B. 482.

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LOPES, L.J. I am of opinion that the appeal must be dismissed. The determination of the case depends entirely upon the true construction of s. 14 of 9 Geo. 4, c. 61. [The Lord Justice read the section.]

The Divisional Court have determined that Roberts having made his application at the special session on September 27, and his application having been granted, the power of the justices to assist him under s. 14 is exhausted, and they had no jurisdiction to grant him any licence under that section on January 3, inasmuch as it was not intended by that section that he should be a "new tenant" twice over. He had availed himself of the privilege given him by s. 14 on September 27, and had obtained authority to sell beer up to October 10, 1890, and, that being so, he could not make a second application under that section.

I think that s. 14 was intended to apply only to a person who leaves a house of this kind between the Brewster Sessions and October 10 following. It was intended to afford a relief which would be necessary and desirable in such circumstances. I agree with the view of the Divisional Court with regard to this section.

It was pressed upon us that this construction would create a very serious hardship; that it would necessitate the shutting up of houses of this kind for long periods. But, on careful consideration of the provisions relating to these houses, it does not appear to me that this result would follow. The course which was open to Roberts, and which he ought to have pursued, was this: he ought, on September 27, to have applied at the special sessions under s. 14, as a "new tenant" to be permitted to hold his licence until October 10 following. That would have made him safe up to that period. Then he ought at the adjourned Brewster Sessions, which were held on the same day, to have applied for a renewal of John's licence. The effect of those two applications, when granted, would have been to entitle him to occupy the house and to sell beer there up to October 10, 1891, which was all that he wanted. It was urged upon us that the case might be brought within these words "shall have wilfully omitted or shall have neglected to apply," and it was said that John had wilfully omitted and had neglected to apply for the licence. But the

person who neglected to apply was not John; it was Roberts, for, as I have already said, he might have made the application for the renewal at the adjourned sessions held on September 27.

I think, therefore, that the Divisional Court have rightly construed this section, and that the words "new tenant" mean an immediate new tenant who has not already obtained a licence.

In my opinion, therefore, this appeal should be dismissed.

KAY, L.J. I agree in the decision of the Divisional Court, but not with the mode in which they have arrived at it. It seems to me that under s. 14, Roberts had two rights as a "new tenant"—the one to apply for a licence up to October 10, 1890, and the other to apply for a renewal of that licence for the succeeding year ending October 10, 1891. The former of these two rights he undoubtedly had, and he applied at a special session under s. 14, for a licence up to October 10, 1890, and he obtained it. If his predecessor John, being about to leave the premises, had neglected to apply at the Brewster Sessions, or any adjournment thereof, for a renewal of his licence from October 10, 1890, and there had been no neglect to make such an application by Roberts himself, it seems to me that under s. 14 Roberts would have had a right as a "new tenant" also to apply for a renewal of the licence from October 10, 1890. I am not satisfied that, because he applied for a licence up to October 10, 1890, and obtained it, his rights as new tenant were exhausted. If there had been no neglect on his part to apply for a renewal, but the neglect had been that of his predecessor John, I should have thought that Roberts would have been entitled to apply under s. 14 for a renewal of the licence, such an application being entirely different from that on which he actually succeeded, viz., an application for a licence up to October 10, 1890. I think there would have been no difficulty in treating him as a "new tenant" for the purpose of both those applications. Whether they were made at the same time or at different times seems to me not very material. In fact, after Roberts became tenant, and was in occupation of the house, an adjourned Brewster Sessions was held on September 27, and, although he had not obtained a transfer of John's licence, he

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might then have applied for a renewal of the licence from after the next succeeding October 10. That very point was decided in *Reg.* v. *Justices of Liverpool* (1), where a Mrs. Barker, having obtained a sub-lease of a licensed house, applied at a special session for a transfer to herself of the licence held by her landlord. Her application was opposed by the landlord, and was refused, so that she did not obtain any transfer of the original licence. She was in occupation of the house at the time of the general annual licensing meeting (commonly called the Brewster Sessions), but she was about to leave, and she did not apply at that meeting, or at any adjournment thereof, for a renewal of the licence, and the Court of Appeal held that Mrs. Barker was a person who could have made an application for a renewal of the licence. That is to say, they held that, although she had not obtained a transfer of the existing licence, yet, being an occupier at the time of the Brewster Sessions, she might have applied for a renewal of that licence. For the present purpose, the facts of that case are identical with those of the present case. Roberts was the occupier of the house (he took possession not later than September 5), at the date of the adjourned Brewster Sessions on September 27; he might, therefore, have then applied for a renewal of John's licence from and after October 10 next following. He did not do so, and therefore it was not John but himself who neglected to apply. The neglect is by the new tenant himself, and, therefore, he could not apply under s. 14 to have a renewal of the licence.

For this reason I agree with the result of the judgment of the Divisional Court, but I do not arrive at that result in the way in which they did.

Appeal dismissed.

Solicitors: *R. White, for J. A. Thomas, Swansea; R. White, for Jenkin Jones, Swansea.*

(1) 11 Q. B. D. 638.

W. L. C.

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BRACE *v.* ABERCARN COLLIERY COMPANY.
HUGGINS *v.* LONDON AND SOUTH WALES COLLIERY COMPANY.

Mine—Wages—Payment by Weight of Mineral—"Actual Weight gotten of Mineral contracted to be gotten"—Coal Mines Regulation Act, 1872 (35 *&* 36 *Vict. c.* 76), *s.* 17—*Coal Mines Regulation Act,* 1887 (50 *&* 51 *Vict. c.* 58), *s.* 12, *sub-s.* 1.

By s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887, "where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten . . . provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten."

The plaintiffs were employed in the defendants' collieries to cut large coal at wages which depended on the weight gotten. The coal was cut as large coal, but a considerable amount of small coal was produced in the conveyance of the coal to the pit's mouth and screening it. The coal raised was screened at the pit's mouth, and the defendants made deductions from the plaintiffs' wages in respect of the small coal found in it. The plaintiffs sued the defendants for the amounts so deducted:—

Held, affirming the decision of the Divisional Court, that the small coal was part of "the mineral contracted to be gotten" within s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887, and that the deductions were illegal, and the plaintiffs were therefore entitled to recover:—

Held, also, that the sums allowed for the small coal were to be at the same rate as that paid for the large coal.

Netherseal Colliery Co. v. *Bourne* (14 App. Cas. 228) followed.

APPEALS of the defendants from decisions of a Divisional Court (Pollock, B., and Charles, J.), in favour of the claims of the plaintiffs, who were miners employed in the defendants' collieries, to recover respectively 1*l.* 9*s.* 6*d.* and 1*l.* 11*s.* 4*d.* for small coal gotten between February 7 and April 5, 1890, such sums having been deducted from the plaintiffs' wages contrary, as they alleged, to s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887. (1)

The facts were substantially the same in both actions, and

(1) [1891] 1 Q. B. 496.

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were shortly as follows:—The plaintiffs were employed under oral contracts to cut coal at wages regulated according to a "sliding scale" agreed upon by the Monmouth and South Wales Collieries Association—a body consisting of representatives of employers and workmen in the district. The plaintiffs were paid for cutting large coal at 1*s.* 6*d.* per ton, with an addition of 32½ per cent. as fixed by the "sliding scale;" but the defendants refused to pay for the small coal.

The mode of weighing the coal and making a deduction in respect of the small coal was the same in both collieries, and is described in the previous report. It is sufficient to state that the coal, having been brought to the pit's mouth in boxes or trucks, was screened in a machine known as "Billy Fairplay." The large coal which passed over the screen fell into railway trucks, and the small coal which passed through the screen fell into a box, and was weighed automatically, and the amount of the small coal thus ascertained was deducted from the gross amount of coal in each truck, and the workman was paid upon the net weight, after making this deduction. The average weight of coal in each truck was twenty-two hundredweight, and the average weight of small coal was 2¾ per cent. The coal was cut as large coal, and the small coal was produced in the processes of filling the boxes or trucks and tipping the coal on to the screen.

The plaintiffs' claim was based upon the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 12, sub-s. 1, by which it was enacted that "where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight of the mineral contracted to be gotten." And the plaintiffs relied upon the authority of *Netherseal Colliery Co.* v. *Bourne* (1), by which it was decided that slack raised from the mine and separated from the coal at the pit's mouth in the same way as the small coal in the present case, was mineral gotten within the meaning of the corresponding section of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 17, which enacted that "where the amount of wages paid to any of the

(1) 14 App. Cas. 228.

persons employed in a mine depends on the amount of mineral gotten by them, those persons shall . . . be paid according to the weight of the mineral gotten by them." The defendants contended that the small coal was not part of "the mineral contracted to be gotten," and that the last-mentioned case had no application, having arisen with reference to a section composed in different language to the section in the Mines Regulation Act, 1887. The sections of the two Acts are stated at length in the previous report.

The Divisional Court, affirming the decision of the county court judge for Monmouthshire, held that the case of *Nethersedl Colliery Co.* v. *Bourne* (1) was applicable, and that the deductions complained of were illegal. The defendants appealed.

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Sir *R. E. Webster, A.-G.*, and *A. T. Lawrence*, for the appellants.

Finlay, Q.C., and *Abel Thomas*, for the respondents.

A. T. Lawrence, in reply.

LINDLEY, L.J. This is an appeal from a decision of the Divisional Court, which affirmed a decision of the County Court Judge of Newport, Monmouthshire. There are two actions, but it is quite enough to decide one. I will read Mr. Huggins' plaint—the other is the same thing. In *Huggins* v. *London and South Wales Colliery Co.* the claim is for 1*l.* 11*s.* 4*d.*, for 16 tons 10 cwt. of small coal gotten by the plaintiff and illegally deducted by the defendant company between the dates mentioned in the plaint. It is not an action for unliquidated damages, it is an action for deductions illegally made in respect of small coal.

The terms upon which the plaintiff worked were these: He was employed apparently to obtain what is called large coal, and he was paid at the rate of 1*s.* 6*d.* per ton for such coal. There seems to have been some controversy of long standing as to whether he should be paid something in respect of the small coal which has been referred to, and which small coal owes its origin to the fact that the large coal, which the collier, the

(1) 14 App. Cas. 228.

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plaintiff, cuts and puts into the box, and then puts into the tram, gets worn away in the course of its passage from the place where he cuts it and puts it into the tram to the place where it is turned out and weighed. There is a certain amount of attrition, a certain amount of rubbing away, and of course of the large coal, which does not pass through the screen, and on which alone his wages are paid, there is a certain amount of waste, the waste, be it borne in mind, being part of what he puts into the box and tram. To my mind that is a very important matter. Then in addition to that, there is an agreement entered into between the masters and the men, relating to what is called a sliding scale. This sliding scale agreement came into operation, it is stated, on January 15, 1884; there is a joint committee formed, and it is agreed between the masters and the men that the wages shall be regulated by a sliding scale based upon the average net selling price of coal as ascertained, and from time to time certified by accountants. The average net selling price shall be taken as for large colliery-screened coal delivered free on board at Cardiff. Then "the wages shall be advanced or reduced at the end of each period of three months by additions or reductions of 1¼ per cent. upon the standard wage rates for every increase or reduction of 1½*d.* per ton in the average selling price of coal, in accordance with the following scale." "The average selling price of coal" there refers back to the 7th clause which I have just read. "The average net selling price shall be taken as for large colliery-screened coal."

So far as the contract goes the plaintiff has nothing to complain of, the employers have kept their bargain; but, notwithstanding the contract, the plaintiff says that he is entitled to something more, because there is a clause in the Coal Mines Regulation Act, which entitles him to be paid for the small coal which he got, but which was deducted. The fact of deduction is not in dispute. The learned county court judge, after stating the facts with regard to the agreement with the plaintiff, and the mode of weighing the coal, says: "I think that the defendants have not made out by evidence their case, that in fixing the standard for large coal at these collieries the fact was taken into consideration that nothing was to be paid

for small coal, and that the standard for large coal was fixed at a higher rate for that reason than would have been otherwise the case."

Now, as I have stated before, the plaintiffs cannot complain of any breach of contract, the masters have performed their contract; but the Coal Mines Regulation Act of 1887 contains a clause which prohibits deductions, and it is by reason of that clause that the plaintiffs say they are entitled to more than they could claim under the contract. Before I read the important section, I will point out that by s. 3, this Act applies not only to coal mines but to ironstone mines, mines of shale, and mines of fireclay, and the importance of that will be found presently when we come to consider one of the expressions which is relied upon. Now I read s. 12: "Where the amount of wages paid to any of the persons employed in the mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten," which I understand in this case is coal, and the expression "the mineral contracted to be gotten" is a general expression used, and to be applied as the case may require, to coal mines, ironstone mines, shale mines, and fireclay mines. I understand that as describing the kind of mineral which the man is employed to get, not the size of it nor the weight of it, but coal in one case, ironstone in another case, fireclay in another, and so on. "Those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable." Those last words were put in, and they were not in the corresponding Act of 1872. Then there is a proviso. According to the section nothing is to be deducted; according to that, therefore, if a man getting coal were to send up some other mineral or substance with it which he could not very easily disconnect where he was working, he would have to be paid on that. Then that is provided for: "Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral

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contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs," and so on. To my mind the reading of that is perfectly plain. You cannot construe that in the sense in which we are asked to construe it by the defendants, and say small coal is not mineral contracted to be gotten. Mineral contracted to be gotten, as I have already said, is the kind of stuff the man is employed to get, not the size of it or the weight of it. I have no doubt that the object of that proviso is precisely what anybody would take it to be, that there may be deductions in the case of stones or substances which happened to be mixed up with the coal, or, in the case of fireclay, with the fireclay, or in the case of ironstone, with the ironstone, that is, with what the man has contracted to get.

It appears to me therefore, on the bare facts of this case, that the defendants have made illegal deductions. They have not paid according to the actual weight gotten by the plaintiffs of the mineral contracted to be gotten, because they have deducted some portion of what was contracted to be gotten by them. Now, in a general sense, "mineral gotten" means mineral brought to bank, but the expression here is "gotten by the men." What did the plaintiff get? He got, and he contracted to get, what he put into the box, and he is to be paid for it. Now the moment you deduct anything from that you infringe the Act of Parliament. You do not infringe the contract. The Act of Parliament sets aside the contract, and says, contract or no contract, you must pay for what is gotten.

Now comes the only remaining point: According to what rate? The learned county court judge and the Divisional Court have taken what, I think, is the correct view of the case. I will read what Pollock, B., says, which expresses my own view in language which I cannot improve upon: "As regards the amount recoverable, the county court judge has held that the plaintiffs are entitled to be paid for the small coal at the same rate as that fixed by the contract for the large coal, on the ground that the one was originally part of the other, and I agree with him." I do not myself see how, if you once admit that everything put into the tramcar was coal gotten by him, that you can avoid the

consequence that he is to be paid for that according to the price which is agreed to in this contract.

I have said nothing about *Netherseal Colliery Co.* v. *Bourne* (1), because I prefer to base my decision on the Coal Mines Regulation Act, 1887. It so happens that this Act repeals 35 & 36 Vict. c. 76, which is not exactly, but very nearly, like it; and it is quite obvious that the conclusion at which I have arrived is in strict conformity with the decision of the House of Lords. The Attorney General asked us to put a different construction on this Act from the construction placed by the House of Lords formerly, because of the introduction in the Act of 1887 of these words: "The mineral contracted to be gotten," in the earlier part of s. 2; whereas the expression in the Act of 1872 was "mineral gotten." I do not think myself that the introduction of these words "contracted to be gotten" alters the true meaning of the section. It appears to me they were put in from an artistic point of view by a draftsman who was fastidious, who found that provision in the proviso, and did not find it in the Act. To my mind, the true construction of this Act of Parliament is precisely the same in this respect as the construction put upon the older Act by the House of Lords, and so far as it goes, therefore, the decision of the House of Lords is an authority for this. But I do not base my decision upon the case in the House of Lords; I base it upon the Act of Parliament, and in my view the construction put upon the Act of Parliament by the county court judge and the Divisional Court is right.

FRY, L.J. The material clause we have to construe is the 12th section of the Coal Mines Regulation Act of 1887, and the words which are relevant in that section are these: "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten." Now, it appears to me that it is plain in this case that the mineral contracted to be gotten is coal, and that it is not the less contracted to be gotten because some of it by attrition comes out in the shape of

(1) 14 App. Cas. 228.

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small coal. It is no doubt true that the contract between the parties was to pay for all coal in proportion to a certain part of that coal, namely, the large screened coal; nevertheless the contract was that the miners should get the entirety of the coal. I think, therefore, on the plain construction of those words, all the coal which was weighed was coal contracted to be gotten. I think it is equally true that it is coal gotten; the whole coal, whether small or large, was coal gotten; therefore, I think the difference in the statute which has been made so much of in this case is absolutely immaterial, because that coal, the large and the slack, which came up in those boxes was both coal gotten and coal contracted to be gotten. I think, therefore, that the appellants have taken hold of a mere straw, which cannot support them for one moment. The only point on which I have had any doubt was with regard to the measure of damages. My learned brothers being clear upon the point, I shall only say that I have entertained a doubt whether the damages should be anything more than nominal.

LOPES, L.J. The difference between s. 17 of the Act of 1872 and sub-s. 1 of s. 12 of the Act of 1887, is this: In the former Act the miner is to be paid according to the weight of mineral gotten, and in the later Act he is to be paid according to the actual weight gotten of the mineral contracted to be gotten. Those are different expressions, but in my opinion there is no practical distinction that can be drawn between them. Now, the question to my mind in this case is really this: What is the mineral contracted to be gotten in this case? The mineral contracted to be gotten is coal, and by coal I mean not only the large pieces of coal, but all the coal, whether large or small, which necessarily arises in the course of getting the coal out of the mine, the whole of the coal which unavoidably in the ordinary course of working finds its way into the tubs and to the bank. That which is broken and crushed in the course of its passage to the pit's mouth in my opinion does not cease to be coal contracted to be gotten.

That being my view, it necessarily follows that the deductions which have been made by the respondents in this case are illegal,

and in contravention of the Act. The only question remaining is, at what rate are they entitled to be paid. I agree with Pollock, B. I think they are entitled to be paid at the same rate for the small as is payable for the large, because the small was originally a part and parcel of the large at the time it was gotten by the miners. On these grounds I think this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Wrentmore & Son, for Morgan & Rhys, Pontypridd.*

Solicitors for defendants: *Ullithorne, Currey, & Villiers, for Simons & Plews, Merthyr Tydvil.*

M. W.

MOORE *v.* PEACHEY.

June 26, 29.

Practice—Discovery—Inspection of Documents—Documents referred to in Answer to Interrogatories—Order for Inspection without second Deposit of 5l.—Rules of Supreme Court, 1883, *Order* XXXI., *rr.* 15, 17, 18, 26.

Where interrogatories have been delivered, and the deposit of 5*l.* required by Order XXXI., r. 26, made, and the affidavit in answer refers to documents, an order can be made for inspection of such documents without requiring a further deposit.

APPEAL by the defendant from a decision at Chambers refusing an order for inspection of documents under Order XXXI., r. 18. The defendant had delivered interrogatories and had made the deposit of 5*l.* required by Order XXXI., r. 26. The affidavit in answer to the interrogatories referred to certain documents, and the defendant now applied for an order for inspection of those documents without making a further deposit of 5*l.*

1891. June 26. *L. G. Pike,* for the defendant.

A. T. Lawrence, for the plaintiff.

Cur. adv. vult.

1891. June 29. DENMAN, J. We have consulted the judges and masters with reference to the practice. The point raised turns on Rules of Supreme Court, 1883, Order XXXI., rr. 15, 17, 18.

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The plaintiff sued on an agreement, and did not state whether the agreement which he relied on was in writing or verbal. The defendant delivered interrogatories, and the affidavit in answer referred to documents in writing. The defendant then applied for an order for inspection of those documents. In answer to this application it is contended that the effect of acceding to it would be to make of no effect rule 26 of Order XXXI., which requires a deposit of 5*l.* I do not say that there may not be cases where a party is obviously evading the rule, in which it would be right to refuse inspection, but it is not necessary to decide as to this, for in the present case there is nothing to shew that there is any attempt at evasion. I am of opinion that the word "affidavits" in rule 15, is wide enough to include an answer to interrogatories, and I cannot see why the meaning should be narrowed so as to exclude it.

WILLS, J. I am of the same opinion. I think the defendant has a right to see the documents in question. I can see no reason for cutting down the meaning of rule 15 in the way suggested, by holding that the word "affidavits" does not include an affidavit made in answer to interrogatories. It is contended that in making this application, the defendant is seeking to evade rule 26, but there is no evidence that this is so.

Appeal allowed.

Solicitor for the plaintiff: *R. H. King, for Chapple, Axminster.*
Solicitor for the defendant: *C. R. Hooper.*

P. B. H.

THE QUEEN *v.* HANNAY AND ANOTHER.

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Aug. 6.

Metropolis—Management Acts—House kept open for Music—Certificate of County Council—Unlicensed House—Penalty for keeping open without Certificate—"To be kept open"—41 & 42 *Vict. c.* 32, *s.* 12.

The provisions of s. 12 of the Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), requiring for houses, rooms, or other places of public resort to be kept open for public dancing or music, a certificate from (now) the London County Council that such house, room, or place, is in accordance with the regulations made by the council in pursuance of the Act, apply to houses not licensed under 25 Geo. 2, c. 36, or 6 & 7 Vict. c. 68.

A RULE nisi had been granted for an order directing a metropolitan police magistrate to hear and determine according to law an application for a summons against a person named Kirby, for keeping open for public music a certain house, room, or other place of public resort, called Saint Andrew's Hall, in Newman Street, without having obtained a certificate from the London County Council, as required by the Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 12. (1)

(1) "The Board" (the Metropolitan Board of Works) "may from time to time make, alter, vary, and amend such regulations as they may think expedient with respect to the requirements for the protection from fire of houses or other places of public resort within the Metropolis to be kept open for the public performance of stage plays, and of houses, rooms, or other places of public resort within the Metropolis, containing a superficial area for the accommodation of the public of not less than 500 square feet, to be kept open for public dancing, music, or other public entertainment of the like kind, under the authority of letters patent from Her Majesty, her heirs or successors, or of licences by the Lord Chamberlain of Her Majesty's Household, or by any justices of the peace, or by any court of quarter sessions, which may be granted for the first time after the passing of this Act; and may by such regulations prescribe the requirements as to position and structure of such houses, rooms, or places of public resort which may, in the opinion of the board, be necessary for the protection of all persons who may frequent the same against dangers from fires which may arise therein or in the neighbourhood thereof.

* * * *

"From and after the making of any such regulations it shall not be lawful for any person to have or keep open any such house, room, or other place of public resort for any of the purposes aforesaid, unless and until the board grant to such person a certificate in writing under their seal, to the effect that such house, room, or other place

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The building in question was not licensed under 25 Geo. 2, c. 36, or 6 & 7 Vict. c. 68.

Craies, for Mr. Kirby, shewed cause. No proceedings can be taken under 41 & 42 Vict. c. 32, s. 12, without shewing that the place in question was kept open under a licence granted under 25 Geo. 2, c. 36, or 6 & 7 Vict. c. 68. If the place ought to be licensed under one of the earlier Acts, and is wrongfully kept open without being so licensed, proceedings might be taken for the breach of the provisions of that Act, but s. 12 of the Act of 1878 only applies to houses as to which a licence has been obtained. The words "to be kept open" refer only to houses which it is contemplated and intended shall be kept open, that is houses which are duly licensed.

Avory, in support of the rule.

The result of acceding to the argument on the other side would be that a person who broke the law by keeping open an unlicensed house would be in a better position than a person who obeyed the law. The Legislature assumes that people will act according to law. The words "to be kept open" are words of description.

[He was stopped.]

DENMAN, J. If all the three sections of the statute are read together, it is clear that the intention of the Legislature was that the words "to be kept open" in s. 12, should be read as meaning hereafter to be opened, and authorized to be kept open. If one looks at ss. 11 and 13, one finds that the language of

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was on its completion in accordance with the regulations made by the board in pursuance of the provisions of this Act for the time being in force, and in so far as the same are applicable to such house or other place, and to the conditions (if any) annexed thereto by the board.

"In case any such house, room, or place of public resort is opened or kept open by any person for any of the purposes aforesaid, contrary to the provisions of this enactment, such person shall be liable to a penalty not exceeding 50*l.* for every day on which such house or place of public resort is so kept open as aforesaid."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40, sub-s. 8, the powers, duties, and liabilities of the Metropolitan Board of Works are transferred to the London County Council.

those sections supports this construction of s. 12. Sect. 11, refers to cases in which places at the time of the passing of the Act, were authorized to be kept open, and were then kept open. Then in s. 12, the words "to be kept open," are used in contrast to the words "authorized to be kept open . . . and which is kept open" in s. 11. In my opinion, this is a more reasonable construction than to limit the meaning of the Act as contended for. The language of s. 13 is also in favour of that construction, for it makes the certificate a condition precedent to the use of a licence; and that affords a strong reason for putting the same construction on s. 12. I cannot think that the language of the statute means that where no licence has been obtained the certificate can be dispensed with. The words "to be kept open" are analogous to such an expression as "vehicles to be licensed." There is no real difficulty in the case when the three sections are read together, although the language may not be very appropriate. We give no decision as to the liability of the person sought to be charged in this particular case. We only decide that the magistrate was mistaken in holding that the Act did not apply, and, therefore, that an order to hear and determine must be made.

COLLINS, J. I am of the same opinion. From the terms of the preamble to the Act, it is obvious that provision is to be made to ensure the safety of the public. That is the point of view from which the Legislature deals with the subject. Sect. 11 contemplates that a licence shall be required, and the places referred to in s. 12 will also require a licence. The Act of Parliament contemplates that all parties concerned will obey the law. The words of s. 12 mean places which are about to be kept open, and which, if they are kept open, ought to be licensed. We only express our opinion as to the meaning and intention of the Act; the magistrate will have to decide the question of liability on the facts of the particular case. It is argued that there is a vested right on the part of an offender against the Act to have the verdict of a jury on the question as to his liability; but if that were so, the time which would necessarily elapse between the date of the offence and the trial of the indictment

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would cause unreasonable delay and frustrate the purpose of the Act. I think there is much force in Mr. Avory's argument, that the contention put forward in showing cause against the rule would place a wrong-doer in a better position than a person who acted in obedience to the law. If the contention in question were correct, the person sought to be charged would be enabled to set up his own wrong by way of defence.

Rule absolute.

Solicitor for prosecution: *W. A. Blaxland.*

Solicitors for defendant: *Peake, Bird, Collins, & Peake.*

P. B. H.

July 23.

THE QUEEN *v.* GUARDIANS OF THE WOOLWICH UNION.

Metropolis—Valuation—Valuation Lists—Totals of Gross and Rateable Values —Alteration of—Reduction in Values of Hereditaments—Valuation of Property (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 32, 34, 41.

By the Valuation of Property (Metropolis) Act, 1869, s. 6, the overseers of every parish to which the Act applies shall make and sign a valuation list of the rateable hereditaments in their parish, which list, by s. 14, shall be revised and finally approved by the assessment committee of the union, who shall thereupon cause the totals of the gross and rateable value on such list to be ascertained and inserted in the list. Sect. 32 gives to any ratepayer an appeal to quarter sessions against any decision of the assessment committee by which he is aggrieved; and an appeal is also given to any assessment committee, overseers, ratepayer, or body of persons authorized by law to levy rates, if they or he feel aggrieved by reason of the totals of the gross or rateable values of any parish being too high or too low. By s. 34 the quarter sessions on appeal "may confirm or alter the valuation list so far as it is questioned by the appeal."

After the valuation lists in four parishes comprising a union had been duly made and approved, various ratepayers appealed against such lists on the ground that the gross and rateable values of specific hereditaments comprised therein were too high, and the quarter sessions reduced some of those values. No appeal was brought against the totals of the valuation lists, and no alteration in those totals was made by the quarter sessions:—

Held, that the reduction, on appeal, of the values of the specific hereditaments comprised in the valuation lists of the parishes did not alter the total gross and rateable values appearing in such lists, which total values could only be altered by appealing against them.

MANDAMUS.

At the instance of the London County Council a rule nisi was obtained calling upon the guardians of the Woolwich Union

to shew cause why a writ of mandamus should not issue to them commanding them, out of moneys in their hands applied by law to that purpose, to pay, or to raise in manner provided by law and pay, to the treasurer of the London County Council the sum of 5889*l.* 13*s.* 8*d.*, being the moneys appointed and required to be paid on or before June 12, 1891, by a certain precept issued and sealed on May 15, 1891, and addressed to the said guardians, in accordance with the requirements contained in the said precept.

The Woolwich Union comprised four parishes, which were all situate within the county of London. Those parishes were, by the last quinquennial valuation lists, which came into force on April 6, 1891, assessed in total sums which made an aggregate for the union of 516,569*l.* gross value, and 481,200*l.* rateable value, under the provisions of the Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67).

The assessment committee of the union duly revised and finally approved the valuation lists of the parishes, and caused the totals of the gross and rateable values to be inserted in such lists, in accordance with s. 14 of the Act. Duplicates were duly sent to the London County Council and to the overseers of each parish.

No appeal against the totals of any of the valuation lists had been heard or determined, nor any notice of such an appeal given. No alteration was made in the lists by the quarter sessions, so far as the totals were concerned, nor had the chairman of the quarter sessions initialled any alteration of the totals. On May 5, 1891, the London County Council duly made a county rate, and issued their precept to the guardians of the Woolwich Union, the amount thereof being based on the aggregate of the totals of the rateable value in the valuation lists.

After the valuation lists were made and deposited certain ratepayers appealed against them on the ground that the gross and rateable values of certain hereditaments in such lists were too high, and on appeal some of the gross and rateable values were reduced.

The guardians of the Woolwich Union refused to pay the amount of the precept, and claimed to be entitled to reduce the totals of the rateable value in the valuation lists in accordance

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with the reductions which had been made on the appeals by the ratepayers, and offered to pay upon such reduced totals. They subsequently applied to the chairman of quarter sessions to reduce and alter the totals, so as to make them correspond with the sum of the values of the hereditaments comprised in the lists and to initial such alterations, but he refused to do so. The London County Council then obtained this rule.

Bosanquet, Q.C., and *Cutter*, shewed cause. The question in this case is whether the County Council are right in calculating the contribution to the county rate payable by the respondents' union upon the totals in the valuation lists as they stood before the appeals which reduced the values of certain hereditaments in those lists, or whether the contribution ought to be based upon the totals as arithmetically altered by reductions made in the values of those hereditaments. These alterations had been made, and notice thereof given to the London County Council, before their precept was issued. The question turns upon the provisions of The Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). Sect. 32 gives a right of appeal against decisions of the assessment committee, both as to the values of hereditaments, and also as to the totals of gross value and rateable value. Sect. 34 provides that the justices, on an appeal, "may confirm or alter the valuation list so far as it is questioned by the appeal . . . . and any alteration shall be made by the chairman, who shall place his initials against such alteration." Here the list was questioned by the appeals, and the result was that, alterations having been made in the values of certain hereditaments, the totals were necessarily altered; the alterations were initialled by the chairman, and the subsequent alteration in the totals was a mere matter of arithmetic which would not have to be done by the chairman. Then s. 41 provides that notice of "every alteration in the total gross or rateable value made in consequence of any decision on appeal" shall be given to (now) the clerk of the London County Council. The alterations in the totals of these lists, for which the respondents contend, were "made in consequence of" the appeals, and due notice thereof was given. The chairman refused to initial

any alteration of the totals, but it was not necessary for him to do so in this case, as there was no appeal against totals. *Reg.* v. *Justices for the Metropolis* (1) does not touch this question.

Meadows White, Q.C., and *Horace Avory*, were not called upon to support the rule.

DENMAN, J. I am not surprised that doubts should have arisen under these Acts of Parliament as to whether the totals in the valuation list are conclusive as between the several parishes and unions or not. Now that our attention has been directed to all the sections which are material to the question, and to the decisions, I have come to a clear opinion that the contention of the county council is right, and that there is no power at all to treat this valuation list, as between the several parishes, otherwise than as conclusive. The precept, which the county council desires to enforce, is a precept which requires the payment of a portion of the assessment made upon the respondent union in accordance with the valuation lists. The respondents object to that precept, and contend that, because the assessment sessions have made some alterations in individual assessments in the valuation lists, therefore something has happened which causes the total of the valuation lists to be less by about 100*l.*, as a mere matter of arithmetic, than it was originally, and that the total must be reduced accordingly. The county council answer that it is not competent for the respondents to say that the valuation lists are not correct as to their totals, merely because some individual assessments were placed too high and have been reduced, and that upon a fresh addition the totals of the valuation lists should be altered. I agree with that contention, and think that the intention of the Act was that the valuation list, unless altered in the specific manner provided by the Act, which is not the case here, should be conclusive as between the several parishes. I think that the reasons given by the county council for their contention, as stated in their letter to the respondents, are quite correct; they say, "if the totals be appealed against and altered, the separate assessment of hereditaments will not therefore be altered, and so, on the other

(1) 17 Q. B. D. 394.

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hand, if the separate assessments be appealed against and altered, the totals will not be altered without special order to that effect, and, as it is considered, upon an appeal against the totals." In my opinion the whole scheme of the Act is that the totals should remain as assessed in the valuation list, and not be altered because of any dissatisfaction by individuals and alteration in individual assessments. It is certain, at any rate, that there was no right to alter the totals unless certain things have been done which have not been done in this case. The provisions of s. 44 strongly shew that this was the intention of the legislature, for it provides for re-payment of any excess rate paid before an appeal is heard, if, on the hearing of the appeal, the value is reduced. So that if any over payment takes place, which is an over payment by reason of subsequent events, a mode of allowance is provided which is equivalent to repayment, and thus justice is done. There is nothing, however, in the Act shewing any intention whatever that the valuation lists should be treated otherwise than as conclusive between parishes and unions. The subsequent ss. 45 and 47 also point to the same conclusion, that the totals of the valuation list are not to be altered because of alterations in individual assessments.

However large, or however small, the alterations in the individual assessments may be, the rule as to the totals is the same; if the alterations were very large there might be an appeal against the totals, and the disproportion thus set right. I am of opinion that this precept must be enforced and the rule made absolute.

WILLS, J. I am of the same opinion. When the different sections of the Act of 1869 are carefully considered, they present no difficulty, and it seems to me that the scheme of the Act is intelligible and reasonable. When the overseers of the several parishes have presented their respective valuation lists, and the assessment committees have dealt with them, then the gross and rateable values of each parish are to be added up and the totals to be ascertained. When the gross and rateable totals have been once ascertained, they then assume a new form and become something which is incapable of alteration, except by pursuing

the method pointed out by the Act, that is, by an appeal against totals, under s. 32. Under s. 32, there may be appeals by individuals against individual assessments, and by parishes or unions against totals, and the latter is the only way in which the totals can be altered. If the totals are altered in this way, it is clear that they will not be the sum of the individual assessments, and therefore it follows that the totals need not necessarily be altered because the individual assessments have been altered. This appears clearly from the appeal sections, especially s. 32, by which the right of appeal is given to individuals, and also to parishes and unions, and the only right of appeal against totals is that given to parishes and unions. Under the Act, the only alterations in the valuation list which can be made, must be made by the chairman of the sessions, and I think that the chairman was right in this case in saying that he had no power to alter the totals upon appeals against individual assessments. The totals are not under the Act necessarily the arithmetical exposition of the sum of the individual assessments. It is perfectly true that the result may be one which is not exactly mathematically correct as to the assessments of the various parishes among themselves. Such precision is not attainable, but the result is generally approximately right, and there is no reason to suppose that there is more error in the assessment of one parish than in that of another. I see no reasons, on grounds either of justice or convenience, which can lead us to construe the Act of Parliament in the way the respondents ask us to do, which would, I think, be contrary to its clear provisions, the effect of which is that an appeal against an individual assessment is not an appeal against totals, and the result of the former kind of appeal has no effect upon totals. *Reg.* v. *Justices of General Assessment Sessions for the Metropolis* (1) is, I think, a very strong authority to shew that our construction of the Act is the correct one. In that case it was laid down that an appeal against the total gross and rateable values in a valuation list did not affect the valuation of any hereditament in the list. The result in that case was that the totals were altered, but that there was no procedure upon that

(1) 17 Q. B. D. 394.

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appeal which could alter the individual assessments so as to make the sum of them agree with the totals, which shews that the totals are not necessarily the equivalent of the items of assessment. The respondent's contention in this case is that the totals ought to correspond with the items, and that contention fails.

Rule absolute.

Solicitor for the applicant: *W. A. Blaxland.*

Solicitor for the respondents: *Sampson.*

W. A.

C. A.

June 25.

[IN THE COURT OF APPEAL.]

BROWN *v.* HAWKES.

Malicious Prosecution—Reasonable and Probable Cause—Honest belief of Prosecutor—Reasonable Care in informing himself of true Facts—Evidence of Malice.

In an action for malicious prosecution the jury found, in answer to specific questions—first, that the defendant did not take reasonable care to inform himself of the true facts of the case; secondly, that the defendant honestly believed in the full charge which he laid before the magistrates; thirdly, that the defendant was actuated by malice and indirect motives in the proceedings taken against the plaintiff. The judge held on these findings that there was an absence of reasonable and probable cause, and judgment was entered for the plaintiff. On appeal:—

Held, by Cave, J., that, as the facts were not in dispute, the judge was wrong in leaving the first question to the jury; that, in view of the finding of the jury as to the honest belief of the defendant, and in the absence of evidence of express malice, the jury could not reasonably draw the inference that the defendant was actuated by indirect motives; and that consequently the defendant was entitled to judgment.

By A. L. Smith, J., that the judge was right in asking the jury whether the defendant took reasonable care to inform himself of the true facts; that the findings of the jury, when taken together, and applied to the facts given in evidence, amounted to a finding that the defendant was actuated by malice; that there was evidence of malice on which the jury could act; and that the plaintiff was entitled to judgment.

By the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.), affirming the judgment of Cave, J., that although the absence of reasonable and probable cause is some evidence from which malice may be inferred, the jury, by their finding as to the honest belief of the defendant, had negatived any inference which depended solely on such evidence; and that, in the absence of any other evidence of indirect motive, the finding of the jury that the defendant was actuated by malice could not be supported.

APPEAL from the county court of Clerkenwell, in an action for malicious prosecution, remitted from the High Court, and tried

with a jury. A full statement of the facts is not necessary for the purposes of this report; stated briefly they were as follows:—

The plaintiff called at the shop of the defendant, a bootmaker at Bournemouth, and asked to see some boots for his family. The shopwoman refused to give credit, and a porter was sent, with instructions not to leave any boots without being paid for them, to a house named by the plaintiff. The plaintiff's family were not at the house when the porter reached it, but he left a number of pairs of boots there. The plaintiff and his family left for London that evening, taking with them some boots which had not been paid for. Soon afterwards one Adams, a friend of the plaintiff, called at the defendant's shop and explained that the plaintiff had gone to London without paying because he had found that the train left earlier than he had supposed, and said that the defendant might be satisfied that the boots would be paid for, that there was to be a sale of the plaintiff's furniture, and that he was coming back to Bournemouth. The defendant replied that he did not believe the excuse about the train, and that it was all "bosh"; that he did not believe that the plaintiff, who was, he said, an undischarged bankrupt, had any furniture, or would come back. The defendant also stated that the plaintiff was a damned rogue, and he would bring him back. He added, "He will come back if I fetch him," and that he would place the matter in the hands of the police and obtain a warrant. The defendant made inquiries and found that the plaintiff had told other persons, as he had told the shopwoman, that he was going abroad. The defendant, the same evening, stated the facts to the magistrates' clerk, and obtained a warrant for the plaintiff's apprehension. Four days afterwards the defendant received a letter from the plaintiff, from an address in London, asking for the bill for the boots. The defendant gave this letter to the police of Bournemouth, and the plaintiff was arrested the same day in London and taken to Bournemouth, where he was brought before the magistrates and discharged.

It appeared that some time previously the plaintiff had received his discharge in bankruptcy, subject to four months' suspension, and that at the time of his going to London he had made arrangements for the sale of some furniture belonging to his wife,

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and had left his London address with the auctioneer, and also at the post office at Bournemouth.

The following questions were put by the judge and answered by the jury as follows:—

First: Did the defendant take reasonable care to inform himself of the true facts of the case when he proceeded against the plaintiff?—Answer: No.

Secondly: Did the defendant honestly believe in the full charge which he laid before the magistrates?—Answer: Yes.

Thirdly: Was or was not the defendant actuated by malice and indirect motives in the proceedings taken against the plaintiff?—Answer: Yes.

The judge held upon these findings that there was an absence of reasonable and probable cause, and directed judgment to be entered for the plaintiff for the amount of the verdict.

1890. June 25. *Murphy, Q.C.*, and *R. M. Bray*, for the defendant.

Cock, Q.C., and *Atherley Jones*, for the plaintiff.

Cur. adv. vult.

1891. Jan. 27. CAVE, J. (after stating the facts in detail, delivered judgment as follows). At the hearing of the appeal it was contended on behalf of the appellant, that the judge ought to have held that there was no proof of absence of reasonable and probable cause, and that there was no evidence for the jury in support of either the first or the third findings. My brother A. L. Smith has come to the conclusion that the judge was right in holding that there was an absence of reasonable and probable cause. In the face of his conclusion, I will not say more than that I am not satisfied upon the point, and, had I not come to a clear opinion on the other branch of the case, should have required further time to consider it.

Before parting with this question, I should, however, like to say that, in my judgment, the learned judge ought not to have left to the jury the question which he did leave to them as to the defendant having taken reasonable care to inform himself of the true facts of the case. The facts which the defendant proved

before the magistrates were all of them true and undisputed, and the simple question for the judge was whether they shewed an absence of reasonable and probable cause. If they did shew such an absence, it was quite unnecessary to inquire whether the defendant took reasonable care to inform himself of the true facts. If they did establish the presence of reasonable and probable cause, it was not incumbent on the defendant to make any further inquiries: *Lister* v. *Perryman.* (1) As Lord Bramwell, then Baron Bramwell, remarked in that case, it might have been reasonable to make such inquiries, but it does not follow that it was unreasonable not to make them. It was sought to justify the putting of this question on the ground that a similar question was put in *Abrath* v. *North Eastern Ry. Co.* (2); but in that case the evidence on which the defendant acted in prosecuting the plaintiff was all false. I entertained some doubt whether it was right to put the question even in *Abrath* v. *North Eastern Ry. Co.* (2), where I put it ex majori cautelâ, and it seems to me that, if such a question is to be put in every case, the result will be to transfer the decision of the question of what is reasonable and probable cause from the judge to the jury, except when the judge holds that there is an absence of such cause. If, wherever the judge is of opinion that there is a primâ facie case of reasonable and probable cause, he is still bound to ask the jury whether the defendant took reasonable care to inform himself of the whole of the facts, the result will be that the jury will always be able to overrule the view of the judge by finding that the defendant did not take such reasonable care. The inquiries which it appears to have been suggested the defendant should have made in this case afford some idea of the kind of considerations which would be submitted to the jury if such a question were allowed to be put.

I am, however, of opinion that on the other ground the verdict cannot stand. The jury have found that the defendant honestly believed in the full charge which he made before the magistrates, and in this finding I agree. They have, however, found also, that the defendant was actuated by malice and indirect motives, and of this I can see no evidence. In considering this part

(1) Law Rep. 4 H. L. C. 521. (2) 11 Q. B. D. 79, 440; 11 App. Cas. 247.

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of the case, I shall assume that Brown intended to pay for the boots before leaving Bournemouth, and was prevented from doing so solely on account of the hurry and confusion occasioned by discovering that the train left some time earlier than he had supposed. I must, of course, also assume that there was a want of reasonable and probable cause for the charge.

Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved, either by shewing what the motive was and that it was wrong, or by shewing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. In this case I do not think that any particular wrong or indirect motive was proved. It is said that the defendant was hasty and intemperate. It may, I think, be assumed that, believing, as the jury have found he did, that Brown had stolen his boots, the defendant was angry; but, so far from this being a wrong or indirect motive, it is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law. He may also have been hasty, both in his conclusion that the plaintiff was guilty and in his proceedings; but hastiness in his conclusion as to the plaintiff's guilt, although it may account for his coming to a wrong conclusion, does not shew the presence of any indirect motive; while his hastiness in action may more fairly be attributed to the fact that the plaintiff had spread a report that he was going abroad. It is suggested that the jury must have meant to find that the defendant did not care whether he was right or wrong in believing that the plaintiff had stolen his boots; but I am quite unable to reconcile that state of mind with an honest belief in the plaintiff's guilt. Can it then be said that the circumstances were such that it is reasonable to presume that some indirect motive was at work in the defendant's mind, although it is impossible to say what it was? I cannot see how this can be affirmed.

The plaintiff's conduct was very suspicious; he left no address with Adams nor any money to pay for the boots. He spoke of calling at Hawkes's and paying for the boots, when he must have known that, as Hawkes's shop was a quarter of a mile beyond

the station, and he had not even time to get to the station before the train was due to start, this was impossible. Before making the charge the defendant detailed the facts of the case, to the inspector of police first, and afterwards to Mr. Selby, the assistant clerk to the magistrates; and it is not suggested that in either instance he was guilty of misstating the evidence. So, again, when he was before the magistrates, the defendant appears to have laid before them nothing but the true facts, and not to have concealed or exaggerated anything. It is true, he states that, notwithstanding the receipt of Brown's letter on the Monday, he still believed in his guilt; but it certainly was unfortunate for Brown that, although he reached London on Thursday, that letter was not posted on Friday, or even in time for the early post on Saturday, so that it was not received in Bournemouth till Monday; and whether the defendant's belief was reasonable or not, the jury have found that it was honest.

Of course, there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable and probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable and probable cause, the jury may always find malice, no matter what the circumstances may be. In this country we rely on private initiative in most cases for the punishment of crime; and while, on the one hand, it is most important firmly to restrain any attempt to make the criminal law serve the purposes of personal spite or any other wrongful motive, on the other hand it is equally important, in the interest of the public, that where a prosecutor honestly believes in the guilt of the person he accuses, he should not be mulcted in damages for acting on that belief except on clear proof, or at all events reasonable suspicion, of the existence of some other motive than a desire to bring to justice a person whom he honestly believes to be guilty. In this case, where the circumstances were so suspicious that the jury found that the defendant honestly believed in the plaintiff's guilt, and where there was no proof whatever of express malice, I come to the conclusion that the facts of the case were such that the

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jury could not reasonably draw the inference that the defendant was actuated by any indirect motive.

For these reasons I am of opinion that the appeal should be allowed, and judgment entered for the defendant; but, as my learned brother is of a different opinion, the appeal will be dismissed without costs, and the verdict for the plaintiff will stand.

A. L. SMITH, J. (after stating the questions and findings). In the first place, what do these findings mean? After reading the evidence given, and applying the questions and answers to the facts of the case, I construe them as meaning that the defendant, in hot haste and not caring whether he was right or wrong, to gratify his own spleen, took the proceedings he did in order to bring the plaintiff back in custody to Bournemouth, and that he did not act as a discreet and cautious man would have acted in the circumstances; that I take to be the true interpretation of the answers to the first and third questions when applied to the facts; and that in such a frame of mind it was that the defendant came honestly to believe in the charge he made; that I take to be the meaning of the answer to the second question. Unless this be what the jury meant the answers to the second and third questions are contradictory; but after reading the evidence in this case, my opinion is that this is their meaning. It must be remembered that they are categorical answers to specific questions.

The question which I have now to determine is not, whether the plaintiff was guilty of larceny by a trick, for this has been adjudicated upon in his favour, but whether there was evidence upon which reasonable men could find as they have, and if so, whether such findings support a verdict for the plaintiff. [The learned judge reviewed the evidence bearing on this point, and continued:—] In my opinion the above constitutes evidence upon which the jury might find that the defendant, in hot haste and not caring whether he was right or wrong, determined to take proceedings against the plaintiff to fetch him back to Bournemouth in custody. It seems to me that upon the facts known to the defendant when he took proceedings against and had the warrant executed upon the plaintiff, there was room for either case, viz., the case about the mistake in the time of the train starting, the

hurry to catch it, and the consequent non-payment for the boots, and also the case of the whole thing being a trick by the plaintiff. If this be so, upon the question of reasonable and probable cause, in my judgment, the judge was right in asking the jury whether the defendant took reasonable care to inform himself of the true facts before giving the plaintiff into custody, or, as I will amplify the question, whether a prudent and cautious man under the circumstances would have acted in the same way, which, I take it, is the same thing; and upon the answer given it was for the judge to say whether the plaintiff had or had not proved an absence of reasonable and probable cause for prosecuting the plaintiff.

But it was further argued that there was no evidence of malice in the defendant. It was for the jury to say upon the evidence above set forth whether the defendant in his rage did not intend to gratify his spleen against the plaintiff for having left without paying for the boots by bringing him back in custody to Bournemouth, or whether his sole intention was honestly to put the criminal law in force against him. If the first was his real intention, in my judgment there was evidence of malice. It is true that the jury found that the defendant honestly believed in the full charge he made; but as before stated, I read the finding to be that he did so because of the unreasoning state of feeling he had got himself into; and if this be so, it seems to me that, in conjunction with this finding, the jury might find malice in the defendant.

In my judgment there was evidence of want of reasonable and probable cause, and also of malice, upon which the findings of the jury can be supported; and for the reasons above stated I think that the findings of the jury support a judgment for the plaintiff, and that the verdict and judgment should stand.

Appeal dismissed without costs.

The defendant appealed. H. D. W.

1891. June 25. *Murphy, Q.C.*, and *R. M. Bray*, for the defendant.

Atherley Jones, for the plaintiff.

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LORD ESHER, M.R. In this case the plaintiff's action against the defendant is for malicious prosecution. The law as to such a case has been laid down over and over again and is not in doubt, and the only question is whether there is any evidence upon which one of the findings of the jury can be sustained. In an action for malicious prosecution it is necessary, in the first place, that the plaintiff should prove a want of reasonable and probable cause for the action of the defendant in charging him, and if he fails in doing this his case is at an end. The question whether there is an absence of reasonable and probable cause is for the judge and not for the jury, and if the facts on which that depends are not in dispute, there is nothing for him to ask the jury, and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left specifically to the jury, and when they have been determined in that way the judge must decide as to the absence of reasonable and probable cause. In the present case it may be said that there was a fact in dispute, though I doubt if this is correct, and on that point am inclined to agree with Cave, J.; but assuming there was a fact in dispute, the judge has put the right question to the jury, and has ruled that there was an absence of reasonable and probable cause. I do not say that we disagree with him, so that I will assume he was right. But, in an action for malicious prosecution, that is not enough to determine the case, for the plaintiff must go beyond that and shew that the defendant was actuated by malice. Now, although it is correct to say that want of reasonable and probable cause for the prosecution is some evidence of malice, it goes before the jury with the other facts of the case which go to establish the existence of malice. In this case the jury have found that the defendant did honestly believe in the full charge that he laid before the magistrates. Under these circumstances, we have to see whether there was any evidence beyond the absence of reasonable and probable cause on which the jury might find that the defendant was malicious in fact. It might be shewn that although the defendant thought the plaintiff was guilty, yet in preferring the

charge he was not acting upon that view, but from some indirect motive. No such evidence has been pointed out to us, and, indeed, its existence is negatived by the finding of the jury as to the honest belief of the defendant. If the argument for the plaintiff is right, it would in such a case only be necessary to shew the absence of reasonable and probable cause, and, however clear it might be that the defendant acted honestly, the absence of reasonable and probable cause would be proof to the contrary.

I think that when the judgments of the learned judges in the Divisional Court are examined, it appears that there was no difference of opinion as to what had to be proved, nor as to the evidence that was necessary. A. L. Smith, J., thought there was evidence that the defendant was reckless as to whether the charge he was making was true or false; while Cave, J., thought there was no evidence of this. I agree with Cave, J., and if that is the right view to take, there was no evidence on which the jury were entitled to answer the third question put to them in the affirmative, after they had answered the second as they did. I think, therefore, that the judgment should have been entered for the defendant, and that the appeal should be allowed.

BOWEN, L.J. I am of the same opinion, and I should add nothing but for the conflict of opinion between the learned judges in the Divisional Court, and the few words I shall add do not in any degree go to modify anything in the declaration of the law which has been already given, more particularly in the admirable exposition of the law in Cave, J.'s, judgment.

The question whether there is want of reasonable and probable cause is for the judge. But the opinion which the judge has to pronounce on this point often depends upon a dispute as to facts, or as to the right inference from facts, which are specially matters for the jury. It is sometimes said that the non-existence of reasonable and probable cause is some evidence from which the jury may infer malice. This is based upon the idea referred

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to in what Lord Mansfield says in *Sutton* v. *Johnstone* (1), viz., that if there is an absence of reasonable and probable cause, the jury may think that the defendant knew there was no probable cause. In this case the jury acquitted the defendant with regard to that inference which might have been drawn, and said that he believed honestly that the man was guilty. We therefore have to consider, as the jury have negatived that possible proof of indirect motive, what other evidence there is on the point. I can see none; and if there was none, the judgment should have been for the defendant.

KAY, L.J. The learned judge before whom the case was tried left three questions to the jury, and the result of their answers is, that they found that the defendant was negligent in inquiring as to the true facts of the case, but that he honestly believed that the plaintiff had stolen his goods, and yet that he acted maliciously in prosecuting the plaintiff. I think there can be no question about the law of the case; there is only a question of fact. It was assumed by the House of Lords in *Lister* v. *Perryman* (2), that if circumstances of suspicion exist which might readily have been explained by proper inquiry, and no inquiry is made, that is some evidence of want of reasonable and probable cause. The judge, in this case, decided that there was an absence of such cause. That left to the jury to decide merely the question of whether the defendant was actuated by malice. Now, if he honestly believed the charge which he made against the plaintiff, some distinct evidence is required to prove malice, and the only question before us is, what is relied on as evidence of malice. As I understand the argument for the plaintiff, it was said that the evidence to prove malice was that the defendant did not make proper inquiry as to the facts of the case. If that is all, and if that evidence is sufficient, the result would be that the finding on the first question put to the jury, that the defendant did not take proper care to inquire into the facts of the case, would, without more, determine the action in favour of the plaintiff. That cannot be so, and when I look at the

(1) 1 T. R. 493, at p. 545. (2) Law Rep. 4 H. L. C. 521.

evidence (as I have done with care) to find what evidence there was of sinister motive, I can find none on which the jury could reasonably find that the defendant was actuated by malice. Upon that ground I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Coburn & Young.*

Solicitors for defendant: *Winter & Co., for Mooring, Aldridge, & Haydon, Bournemouth.*

A. M.

END OF VOL. II.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1892, will be as follows:—

In the First Series,

[1892] 1 Ch. [1892] 2 Ch. [1892] 3 Ch.

In the Second Series,

[1892] 1 Q. B. [1892] 2 Q. B. [1892] P.

In the Third Series,

[1892] A. C.

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2. —— *Milk in course of Delivery under a Contract of Sale—Delivery in Several Cans—Separate Informations in respect of Samples from more than one Can—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 9, 13—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.] The appellant contracted to supply milk to a workhouse at a certain price; by the contract the milk was to contain a certain percentage of cream; it was to be tested on each delivery, and a reduction was to be made in the price in respect of any deficiency in cream. While the daily supply, contained in five cans, was being delivered at the workhouse the respondent, acting under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, procured a sample from each of the five cans; there being a large deficiency of cream in two of the samples, the respondent subsequently laid two separate informations against the appellant in respect of those two samples under s. 9 of the Sale of Food and Drugs Act, 1875. The justices convicted the appellant in a separate penalty upon each information:—*Held*, that the procuring of each sample was a separate transaction; that the appellant had committed a separate offence as to each can in respect of which an information was laid; that the separate informations were therefore properly laid, and the convictions were right:—*Held*, further, that the provisions in the contract as to deficiency of cream were immaterial in the determination of the question whether the appellant had committed an offence under the Act. FECITT *v.* WALSH - - - - - - 304

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Act, 1889, which provides that an arbitrator shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, applies to arbitrations under the Building Societies Act, 1874:—So *held*, reversing the judgment of the Queen's Bench Division. IN RE KNIGHT AND TABERNACLE PERMANENT BUILDING SOCIETY - C. A. 63

2. —— *Submission to Arbitration—Application to stay Proceedings on Counter-claim—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—"*Step in the Proceedings.*"] By s. 4 of the Arbitration Act, 1889, it is provided that "if any party to a submission . . . commences any legal proceedings in any Court against any other party to the submission in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to that Court to stay the proceedings." The plaintiff brought an action for work done under a building contract, which contained a general submission to arbitration of all disputes arising out of the contract. The defendant counter-claimed for damages arising out of breaches of the contract. Subsequently to the delivery of the counter-claim the defendant took out a summons for directions under Order XXX. for the purpose of obtaining discovery from the plaintiff. On the hearing of the summons the plaintiff applied for and obtained, under rule 2 of that order, leave to administer interrogatories to the defendant. The plaintiff subsequently discontinued his action, and proposed to refer the whole matter to arbitration, and, upon the defendant refusing to allow the counter-claim to be referred, took out a summons under s. 4 of the Arbitration Act, 1889, to stay the proceedings on the counter-claim:—*Held*, that the plaintiff's application for leave to administer interrogatories was a step by him in the proceedings, and there was consequently no jurisdiction to make the order. *Semble*, that the delivery of a counter-claim is "the commencement of a legal proceeding" within the meaning of the section. CHAPPELL *v.* NORTH - 252

3. —— *Submission before January*, 1890—*Arbitration after January*, 1890—*Power of Arbitrator to award Costs—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 2, 25, 26.] By the Arbitration Act, 1889, s. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act," one of which is "the costs of the reference and award shall be in the discretion of the arbitrators or umpire;" and by s. 25, the Act "shall apply to any arbitration commenced after the commencement of this Act (January 1, 1890), under an agreement or order made before the commencement of this Act." In an arbitration commenced after January 1, 1890, pursuant to a submission, entered into before that date, which was silent as to costs, costs were awarded by the arbitrators:—*Held* (reversing the judgment of the Queen's Bench Division), that s. 2 refers to all submissions, whether made before or after the commencement of the Act, and that the arbitrators had power under the Act to award costs. IN RE WILLIAMS AND STEPNEY C. A. 257.

—— Reference — Official referee — Jurisdiction to order commission to examine witnesses—Jurisdiction to review referee's decision - - - - 236
See PRACTICE. 7.

ARMY—*Pay and Retiring Allowances—Royal Warrant—Secretary of State for War—Mandamus—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 136.] A mandamus will not lie against the Secretary of State for War to compel him to carry out the terms of a royal warrant regulating the pay and retiring allowances of the officers and soldiers of the army, inasmuch as no legal duty in relation to such officers and soldiers is imposed upon the Secretary of State either by statute or by common law. THE QUEEN *v.* SECRETARY OF STATE FOR WAR - - - C. A. 326

ASSETS—Bankruptcy—Salary or income—Wages of workman - - - 231
See BANKRUPTCY. 3.

ATTESTATION — Bankruptcy — Proxy of creditor - - - - - 151
See BANKRUPTCY.

ATTORNEY-GENERAL—Local Board—Relator—Action for nuisance - - 100
See LOCAL GOVERNMENT.

BAILMENT—*Bailor and Bailee—Bailee for Hire—Master and Servant—Liability of Bailee for Hire for Negligence of Servant.*] The defendant hired a carriage and horse from the plaintiffs. The defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction. While he was thus engaged, the carriage and horse were injured, owing to his negligent driving:—*Held*, that there had been a breach of the defendant's contract as bailee for which he was liable. COUPÉ COMPANY *v.* MADDICK - - - 413

BANKRUPTCY—*Proxy of Creditor—Instrument of Proxy—Attestation by Proxy himself—Sufficiency.*] A person who is appointed by a creditor under rule 15 of Sched. I. of the Bankruptcy Act, 1883, to act as his proxy, cannot himself be the attesting witness to the instrument of proxy. IN RE PARROTT. EX PARTE CULLEN - 151

2. —— *Protected Transactions — Notice of Bankruptcy Petition—Notice served on Sheriff of Bankruptcy Petition against or by Debtor—Execution Creditor—"Sheriff"—Man in Possession—"Officer charged with the Execution of a Writ or other Process"*—46 & 47 *Vict. c.* 52, *s.* 168—53 & 54 *Vict. c.* 71, *s.* 11, *sub-s.* 2.] A man who seizes, keeps possession of, and sells the goods of a judgment debtor by direction of the sheriff, is not an "officer charged with the execution of a writ or other process," and therefore is not a "sheriff" within the meaning of s. 168 of the Bankruptcy Act, 1883, and therefore notice to him, within fourteen days after sale, of a bankruptcy petition having been presented against or by the debtor, is not notice to the sheriff within the meaning of

BANKRUPTCY—*continued.*

s. 11, sub-s. 2, of the Bankruptcy Act, 1890, and does not entitle the official receiver or trustee in bankruptcy to the balance of the proceeds of sale under that section. Opinion of the Court of Appeal in *Ex parte Warren, In re Holland* (15 Q. B. D. 48) followed. BELLYSE *v.* M'GINN [227

3. —— *Assets—Salary or Income—Power to order Payment to Trustee—Wages of Workman—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 53, *sub-s.* 2.] Wages earned by a workman employed in a colliery are not "salary or income" within the meaning of s. 53, sub-s. 2 of the Bankruptcy Act, 1883, and therefore no order can be made under that section for payment of any part of such wages to the trustee in bankruptcy of the person by whom the wages are earned.—*Ex parte Benwell, In re Hutton* (14 Q. B. D. 301) followed. IN RE JONES. EX PARTE LLOYD - - 231

4. —— *Non-compliance with Bankruptcy Notice—Act of Bankruptcy—Payment of Debt of Judgment Creditor—Petition by other Creditor on same Act of Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*g*).] Where a debtor has committed an act of bankruptcy by non-compliance with a bankruptcy notice, under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (*g*), a bankruptcy petition may be presented by any creditor in respect of such act of bankruptcy, although the creditor who served the notice has, subsequently to the act of bankruptcy, received payment of his debt. IN RE POWELL. EX PARTE POWELL - - - - - - 324

5. —— *Disclaimer of Leaseholds — Estate under* 300*l.—Costs "payable out of the Estate"—Taxation on Lower Scale—Bankruptcy Rules*, 1886, *r.* 112, *sub-s.* 2.] The costs of a trustee's application under s. 55 of the Bankruptcy Act, 1883, to disclaim leaseholds, are costs of a "proceeding under the Act" which, as a general rule, are payable out of the estate. Where, therefore, the assets are under 300*l.*, such costs are taxable on the lower scale pursuant to r. 112 (sub-s. 2) of the Bankruptcy Rules, 1886.—*In re Dowson* (21 Q. B. D. 417) distinguished. IN RE PROCTER [433

6. —— *Proof of Debt—Interest—Debt payable at a future date with Interest in meantime—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 40; *Sched.* 2, *r.* 21.] The effect of the Bankruptcy Act, 1883, and r. 21 in Sched. 2 to the Act is that when a debt is by contract payable at a future date, with interest in the meantime, and the debtor becomes bankrupt before the time of payment has arrived, the creditor may prove for interest accruing after the date of the receiving order. In such a case the proper course is to prove the principal sum as a present debt; then, under r. 21, to deduct a rebate of interest at 5 per cent. from the dividends upon it; and then to value the liability to pay interest and prove for that value, the dividend on which is to be paid without any rebate. If the rate of interest contracted for is 5 per cent., the proper course is simply to prove for the principal sum as a present debt, without any rebate. IN RE BROWNE & WINGROVE. EX PARTE ADOR - C. A. 574

BANKRUPTCY—*continued*

—— Misdemeanour — Offence "within four months of bankruptcy petition"—Presentation of petition by bankrupt himself - - - - 145
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—— Lease—Proviso for forfeiture on bankruptcy of lessee or assigns—Assignment of lease—Subsequent bankruptcy of lessee 394
See LANDLORD AND TENANT. 3.

BEERHOUSE—Change of occupation—Transfer—Grant of licence to "new tenant"
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BILL OF LADING—Demurrage—Delay in unloading cargo—Strike of dock labourers
See SHIP. 2. [626

—— Pledge—Conversion—Title of plaintiff
See SHIP. 3. [653

BILL OF SALE—"*Marriage Settlement*"—*Agreement for—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.] By the Bills of Sale Act, 1878, s. 4, "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer . . . , and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels . . . . shall be conferred, but shall not include . . . marriage settlements":—*Held* (affirming the judgment of the Queen's Bench Division), that a memorandum of agreement for a marriage settlement, although informal and not under seal, was a "marriage settlement" within the exception in s. 4, and not a "bill of sale." WENMAN *v.* LYON & Co. - - - - - C. A. 192

2. —— "*True Owner*"—*Bill of Sale by way of Security—Subsequent Bill of Sale of the same Goods—Statement of Consideration—Undisclosed Trust—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10, *sub-s.* 3—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 5.] The grantor of chattels by a bill of sale by way of security is still the true owner of the chattels within the Bills of Sale Act, 1882, s. 5, and may execute a subsequent valid bill of sale of the same chattels.—*Tuck* v. *Southern Counties Deposit Bank* (42 Ch. D. 471) distinguished.—A debtor who owed a sum of money partly secured by an existing bill of sale, executed a second bill of sale of the same chattels to secure a fresh advance, on the understanding that out of the sum advanced he should pay off the existing debt. The bill of sale was expressed to be made in consideration of the fresh advance, without alluding to the intended application of the money. The money was actually paid to the grantor and applied by him as agreed:—*Held*, first, that the consideration was truly stated, and secondly, that there was no undisclosed trust within the Bills of Sale Act, 1878, s. 10, sub-s. 3. THOMAS *v.* SEARLES [C. A. 408

BISHOP—Public Worship Regulation Act, 1874—Discretion of bishop to stop proceedings under Act - - - - 48
See ECCLESIASTICAL LAW.

BREACH OF PROMISE OF MARRIAGE—*Corroboration of Promise—Omission to answer Letters, Effect of*—32 & 33 *Vict. c.* 68, *s.* 2.] In an action for breach of promise of marriage, the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was held no evidence corroborating the plaintiff's testimony in support of such promise within the meaning of 32 & 33 Vict. c. 68, s. 2. WIEDEMANN *v.* WALPOLE - - - - - - C. A. 534

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—— *Colquhoun* v. *Brooks* (14 App. Cas. 493) distinguished - - - 378
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—— *Derry* v. *Peek* (14 App. Cas. 337) explained
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—— *Dowson, In re* (21 Q. B. D. 417) distinguished
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—— *Hemp* v. *Garland* (4 Q. B. 519) approved 509
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—— *Jowett* v. *Local Board of Idle* (W. N. 1888, p. 87) followed - - - 216
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—— *Netherseal Colliery Co.* v. *Bourne* (14 App. Cas. 228) followed - - - 699
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—— *Phillips* v. *Silvester* (Law Rep. 8 Ch. 173) followed - - - - 456
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—— *Portsmouth, Corporation of* v. *Smith* (13 Q. B. D. 184) followed - - 216
See LOCAL GOVERNMENT. 5.

—— *Reg.* v. *Bunn* (12 Cox C. C. 316) dissented from - - - - - 545
See CRIMINAL LAW. 4.

—— *Reg.* v. *Burnup* (50 J. P. 598) not followed
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—— *Reg.* v. *Cooper* (24 Q. B. D. 533) distinguished - - - - 208
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—— *Reg.* v. *Druitt* (10 Cox C. C. 592) dissented from - - - - - 545
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—— *St. Mary Islington, Vestry of* v. *Goodman* (23 Q. B. D. 154) overruled - 170
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—— *Stables* v. *Eley* (1 C. & P. 614) disapproved of - - - - - 403
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—— *Tenant* v. *Ellis* (6 Q. B. D. 46) approved
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—— *Tuck* v. *Southern Counties Deposit Bank* (42 Ch. D. 471) distinguished - 408
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—— *Warren, Ex parte, In re Holland* (15 Q. B D. 48) followed - - - 227
See BANKRUPTCY. 2.

—— *Watney* v. *Musgrave* (5 Ex. D. 241) distinguished - - - - 1
See REVENUE.

CHARITY—*Charity Lands—Charity Commissioners—Effect of Lease granted by Charitable Trustees for a period exceeding Twenty-One Years without the approval of the Charity Commissioners—Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.] By the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed, or which may hereafter be passed, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board (i.e., the Charity Commissioners), any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years":—*Held*, by Charles, J., that a lease granted by the trustees of a charity for more than twenty-one years, without the approval of the Charity Commissioners, in contravention of the provisions of this section, was not valid for a term of twenty-one years, but was absolutely void. BISHOP OF BANGOR *v.* PARRY - 277

CHARTERPARTY—Bill of lading—Liability of owner of chartered ship — Principal and agent—Master—Charterer's shipping agent ashore - - 310
See SHIP.

—— Demurrage—Delivery at safe berth as ordered - - - - 647
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—— Site—Consecration of part of site—Vesting of site in incumbent—Street improvement expenses - - 361
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See MINE.

COMMISSION—Examination of witnesses—Official referee—Jurisdiction - 236
See PRACTICE. 7.

—— Scotch law—Production of documents—Persons not parties to the proceeding
See PRACTICE. 8. [241

COMPANY — *Winding-up Order — Subsequent Transfer of Shares—Rectification of Register—Discretion—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 87, 98, 153.] In the case of a sale

COMPANY—*continued.*

and transfer of shares in a company after a compulsory winding-up order, the transferee is not entitled to be registered as owner of the shares without the sanction of the Court: the Court has power to order the rectification of the register of members by the insertion of such transferee's name: but the exercise of that power is discretionary, and such an order ought not to be made except on strong grounds. After an order had been made for compulsorily winding up a building society, a company called the Assets Realization Company bought up a number of shares in the society, which were transferred to their nominees. It appeared that there would be a surplus of assets in the winding-up; and one of the transferees applied for a rectification of the register by the insertion of his name as the owner of shares, with a view to obtaining the right to vote at meetings held in the winding-up. The Court refused the application on the ground that no sufficient reason was shewn for it. IN RE ONWARD BUILDING SOCIETY - - C. A. 463

2. —— *Registration—Private Partnership—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Part VII. s.* 180—"*Company duly constituted by Law.*"] A partnership formed not for carrying on a business, but simply for the purpose of being incorporated under the Companies Act, 1862, in order that it may be forthwith wound up, cannot be registered as a company under Part VII. of that Act. Whether a partnership which is constituted solely by contract between the members is "a company duly constituted by law" under s. 180 of the Companies Act, 1862, so as to be qualified for registration under Part VII., *quære.* The decision of Cave and Charles, JJ., reversed. THE QUEEN *v.* REGISTRAR OF JOINT STOCK COMPANIES. EX PARTE JOHNSTON - C. A. 598

—— List of members—Default in forwarding list to registrar—Mandamus to hear application for summons—Appeal to Court of Appeal - - - 588
See PRACTICE. 16.

—— Estoppel—Share certificate—Damages 614
See ESTOPPEL.

CONTRACT—*Implied Term—Necessary Implication—Agreement for Sale of Products of a Business.*] The defendants, who carried on business as brewers, entered into an agreement in writing, by which they agreed to sell to the plaintiffs, and the plaintiffs agreed to buy, all the grains made by the defendants, at the average of the rates charged each year by certain specified firms, from July 10, 1885, until September 30, 1895. In 1890 the defendants sold their business, and in consequence ceased to supply grains to the plaintiffs:—*Held*, that a term could not be implied in the contract to the effect that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains to the plaintiffs for the period mentioned. Such an implication of a term in a contract ought to be made only where it is necessary in order to give the transaction such efficacy as both parties must have intended it to have, and to prevent such failure of consideration as cannot have been within the contemplation of either party. The question whether in any case

CONTRACT—*continued.*

such an implication ought or ought not to be made must depend on the particular facts of the case. The construction of one contract in this respect affords little or no guidance for the construction of another. HAMLYN & Co. *v.* WOOD & Co. - - - - - - C. A. 488

CONVICTION—Bar to remedy by action—Officer of friendly society—Misappropriation
See FRIENDLY SOCIETY. [288

COPYRIGHT—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Application of to Existing Works—Saving of Rights and Interests previously Acquired—Interests from or in connection with Lawful Production—Valuable Interests—Foreign Composer—Musical Work first produced in Foreign Country—Production of Work in England before operation of International Copyright Act*, 1886.] The International Copyright Act, 1886, by s. 6, provides that, upon an Order in Council being made, foreign composers shall be entitled to copyright in the United Kingdom in respect of works first produced before such order comes into operation, "provided that where any person has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date." An Order in Council was made applying the Act to French subjects. The plaintiff, a French subject, had composed and first produced in France a musical composition called the "Caprice Polka" before the order came into operation, but had not acquired copyright in the United Kingdom. Before the date of the publication of the order, an English publisher had printed and published this work in England, and the defendant, a bandmaster, had purchased a copy for 5s. for the use of his band, and had played it by his band both before and after such date. In an action for damages for the infringement of copyright and for an injunction:—*Held* by the Court of Appeal, affirming the judgments of A. L. Smith and Grantham, JJ., that there was evidence to warrant the finding that the defendant had an interest arising from or in connection with the lawful production of the work in the United Kingdom, which was subsisting and valuable when the Order in Council was published, and that he was, therefore, protected by the proviso to s. 6. MOUL *v.* GROENINGS - - - - C. A. 443

COSTS—Trial with jury—Discretion of judge—Place of trial—"For good cause" 194
See PRACTICE. 5.

—— County Court—Particulars—Signature of solicitor - - - - 208
See COUNTY COURT.

—— County Court—Remitted action—Action of contract in which more than £50 is claimed—Recovery of less than £20 under Order XIV. in all the proceedings
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—— County Court—Admiralty Jurisdiction Act, 1868 - - - - - 293
See PRACTICE. 9.

COSTS—*continued.*

—— Counsel's fees—Refreshers - - 300
See PRACTICE. 10.

—— Bankruptcy—Disclaimer of leaseholds—Taxation on lower scale - - 433
See BANKRUPTCY. 5.

COUNSEL—Number of counsel to be heard—Special case—Order of sessions - 384
See MARKET.

COUNTER CLAIM—Discontinuance of action—Power to order trial of counter-claim in county court after discontinuance of action - - - - - - 71
See PRACTICE.

—— Application to stay proceedings—Submission to arbitration—Step in the proceedings - - - - 252
See ARBITRATION. 2.

COUNTY—Lunatic Asylum—Pauper lunatic—Expenses of maintenance—Additional charge—Power to fix amount of charge
See LOCAL GOVERNMENT. 3. [110

COUNTY COUNCIL—Metropolis—Management Acts—House kept open for music—Certificate of County Council - - 709
See METROPOLIS. 3.

COUNTY COURT—*Practice—Costs—Particulars. Cost of—Signature of Solicitor—Subscription by Clerk—County Court Rules,* 1889, *Order* XXVII., *r* 4, *App—Scale of Costs.*] By the County Court Rules, 1889, App. Scale of costs, certain sums may be allowed to a solicitor for preparing particulars of claim and copies thereof, "provided that such particulars and copies are signed by the solicitor." Particulars were signed in the name of the solicitor by his clerk, in pursuance of a general authority for this purpose:—*Held* (distinguishing *Reg.* v. *Cowper* (24 Q. B. D. 60; 533)), that the signature was sufficient. FRANCE *v.* DUTTON - - - - - - 208

2. —— *Remitted Action—Costs—Taxation—Action of Contract in which more than* 50*l. is claimed—Recovery of less than* 20*l. under Order* XIV. *and less than* 50*l. in all the proceedings—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 65, 116.] An action of contract brought in the High Court for more than 50*l.* was remitted to the county court after the plaintiffs had recovered less than 20*l.* under Order XIV. They recovered in all less than 50*l.*:—*Held*, that the plaintiffs were not entitled to costs on the Supreme Court scale in respect of the part of the proceedings which had taken place in the High Court. WILSON v. STATHAM - - 261

3. —— *Jurisdiction—Title to a Franchise—Infringement of Patent—Patents, Designs, and Trade Marks Act,* 1883 (46 *&* 47 *Vict. c.* 57)—*County Courts Act,* 1888 (51 *&* 52 *Vict. c* 43), *s.* 56.] A plaint in a county court claimed an injunction to restrain the infringement by the defendant of a patent right assigned to the plaintiff, and an account and damages. The defendant's solicitor gave notice that he intended to dispute the validity of the patent. The judge held that he had no jurisdiction to try the case. On an application for a mandamus to him to hear

COUNTY COURT—*continued.*

and determine the action:—*Held*, that the effect of the Patents, Designs, and Trade Marks Act, 1883, was to prevent the county courts having jurisdiction in a proceeding for the infringement of a patent:—*Held*, also (affirming the judgment of the Queen's Bench Division), that the grant of letters patent for the use of a new invention is a franchise within the meaning of the proviso in s 56 of the County Courts Act, 1888, so that a county court has no jurisdiction to try an action for the infringement of a patent where the validity of the patent is in dispute. THE QUEEN *v.* COUNTY COURT JUDGE OF HALIFAX [C. A. 263

—— Remitted Action—Counter-claim—Discontinuance of Action - - - 71
See PRACTICE.

—— Order of County Court Judge for New Trial—Appeal to High Court - - 496
See PRACTICE. 12.

COVENANT—Landlord and Tenant—Breach of Covenant to deliver up Premises in Repair—Measure of Damages - 31
See LANDLORD AND TENANT.

—— Apprenticeship deed—Covenant by infant to pay premium—Liability - 369
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—— Quiet Enjoyment - - - 680
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CRIMINAL LAW—*Extradition—Embezzlement or Misappropriation as a Notary—Fraud by a Bailee—Fraud as an Agent—Sufficiency of Warrants of Arrest and Committal—Attorney or Agent intrusted with Money for safe Custody—Extradition Treaty with France, Article* 3, *Clause* 18—*French Penal Code, Article* 408—24 *&* 25 *Vict. c.* 96, *ss.* 75, 76—33 *&* 34 *Vict. c.* 52.] In order to justify the extradition of the subject of a foreign state, there must be evidence of an act committed by him in the foreign country, amounting to an offence against the law of such country, and which, if committed in England, would amount to an offence against English law. A warrant was issued in France for the arrest of a French subject, accused of having embezzled or misappropriated money delivered to him in his capacity of notary. He escaped from France, and was arrested in English territory, and his extradition was demanded by the French authorities. A magistrate committed him for extradition on a warrant describing him as accused of the crime of fraud by a bailee and fraud as an agent. The French warrant specified nineteen separate charges. On an application for a habeas corpus, the Court came to the conclusion that as to fifteen of the charges, the evidence disclosed no crime punishable by English law. With regard to the other four charges, there was evidence that in each case money was intrusted, without any direction in writing, to the prisoner as a notary, with a view to re-investment as soon as either he or his customer should have found a suitable investment, and that he had misappropriated such money:—*Held*, that the offences charged were sufficiently described, both in the French and in the English warrant, and that the warrants were consistent with each other; that the fact that, as

CRIMINAL LAW—*continued.*

to some of the charges in the French warrant, the evidence did not disclose any crime against English law, was no answer to the claim for extradition: that as to the four charges last abovementioned, there was evidence of offences within the meaning of article 408 of the French Penal Code, and article 3, clause 18, of the Extradition Treaty, and evidence that the prisoner had been intrusted as an attorney or agent with money for safe custody within the meaning of 24 & 25 Vict. c. 96, s. 76, and therefore there was evidence of offences against English law, and extradition ought to be granted:—*Held*, that there was no evidence of offences against 24 & 25 Vict. c. 96, s. 75, because the first part of that section requires that the money should have been intrusted with a direction in writing, and the second part does not apply to money. IN RE BELLENCONTRE [122

2. —— *Bankrupt—Misdemeanour—Presentation of Petition by Bankrupt himself—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-ss.* 13, 14, 15—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 26.] By s. 11, sub-ss. 13, 14, and 15 of the Debtors Act, 1869, certain acts are constituted misdemeanours if committed by a debtor "within four months next before the presentation of a bankruptcy petition against him." By s. 26 of the Bankruptcy Act, 1890 (which came into operation on January 1, 1891), "s. 11 of the Debtors Act, 1869, shall have effect as if there were substituted therein for the words 'if within four months next before the presentation of a bankruptcy petition against him,' the words 'if within four months next before the presentation of a bankruptcy petition by or against him'":—*Held*, that the effect of s. 26 of the Bankruptcy Act, 1890, was not retrospective, so as to render liable to conviction for offences under sub-ss. 13, 14, and 15 of s. 11 of the Debtors Act, 1869, a person who committed the acts specified in those subsections before January 1, 1891, and presented his own petition after that date. THE QUEEN *v.* GRIFFITHS - - - C. C. R. 145

3. —— *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 4—*Carnal Knowledge.*] To prove the offence of unlawfully and carnally knowing a girl under the age of thirteen years, under s. 4 of the Criminal Law Amendment Act, 1885, it is not necessary to prove emission. THE QUEEN *v.* MARSDEN - - - C. C. R. 149

4. —— *Intimidation—Trade Union—Threat of Strike unless Employer ceases to employ Workmen not Members*—6 *Geo.* 4, *c.* 129, *s.* 3—34 & 35 *Vict. c.* 32, *s.* 1—*Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 2, 3—*Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 3, *s.* 7, *sub-s.* 1.] By s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—(1.) Uses violence to or intimidates such other person or his wife or children or injures his property . . . . shall on conviction thereof be liable, &c." The appellant and the respondent were workmen in the same yard, members of different trade unions. The trade union to which the respondent belonged having resolved to strike if the appellant did not leave his society and join theirs, the respondent informed the appellant of this without threatening him with violence to person or property in case of his refusal. The appellant refused to join the respondent's society, and was dismissed in consequence by his employer in order to avoid a strike. He stated in evidence that "he was afraid, because of what the respondent had said, that he would lose his work, and could not obtain employment anywhere where the respondent's society predominated numerically over his own society":—*Held*, that there was no evidence of intimidation by the respondent within the meaning of the section. The appellant and two other secretaries of trade unions, in order to prevent the respondent employing non-union men, informed him that if he did not cease to do so they would call off from their employment by him all the members of their respective unions. After a meeting of the unions, at which it was resolved that this course should be adopted, the appellant and the other secretaries, in the presence of the respondent, whom they asked to attend, made the following statement to the respondent's workmen and others who were assembled: "Inasmuch as Mr. T." (i.e., the respondent) "still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease to work, and go home." The union men in consequence ceased to work:—*Held*, that there was no evidence of intimidation by the appellant within the meaning of the section.—*Reg.* v. *Druitt* (10 Cox C. C. 592); and *Reg.* v. *Bunn* (12 Cox C. C. 316) dissented from. CONNOR *v.* KENT. GIBSON *v.* LAWSON. CURRAN *v.* TRELEAVEN - 545

DAMAGES, MEASURE OF—Lease—Breach of covenant to deliver up premises in repair - - - - - 31
See LANDLORD AND TENANT.

DEFAMATION—*Libel—Privileged Occasion—Railway Company—Publication to Company's Servants of Offences committed by other Servants, with Names of Offenders and Punishments inflicted.*] The plaintiff was a guard in the service of the defendants, a railway company. The defendants dismissed him, on the ground that he had been guilty of gross neglect of duty, and published his name in a printed monthly circular addressed to their servants, stating in it that he had been dismissed and the ground of his dismissal. The plaintiff brought an action for libel against the defendants:—*Held*, affirming the decision of Stephen, J., that the statement was made on a privileged occasion, and that the defendants were not liable. HUNT *v.* GREAT NORTHERN RAILWAY COMPANY - C. A. 189

2. —— *Slander—Privileged Communication—Privileged Occasion—Publication in discharge of Social or Moral Duty.*] In an action for slander it appeared that the plaintiff was a valet, and while he and his master were staying at Newcastle as the guests of the defendant,

DEFAMATION—*continued.*

who was a magistrate and the mayor of the town, the chief constable of Newcastle shewed the defendant a letter which he had received from the Edinburgh police, stating that the plaintiff was suspected of having committed a theft at a hotel in Edinburgh which he had recently left, and suggesting that a cautious inquiry should be made with the view of discovering whether the plaintiff was in possession of the property. The defendant did not make any inquiry, but just before the plaintiff and his master left Newcastle he told the plaintiff's master privately that there had been a theft at the hotel, and that suspicion had fallen on the plaintiff; and some days afterwards the plaintiff's master dismissed him from his employment upon the ground that he had been suspected of dishonesty: —*Held*, by Lindley and Kay, L.JJ. (Lopes, L.J., dissenting), that the occasion of the communication was privileged, and that, in the absence of evidence of malice, the defendant was not liable. STUART *v.* BELL - - - C. A. 341

—— Particulars—Libel—Justification - 582
See PRACTICE. 14.

DEMURRAGE—Bill of lading—Delay in unloading cargo—Reasonable time—Strike of dock labourers - - - 626
See SHIP. 2.

—— Charterparty — Termination of voyage—Delivery at safe berth as ordered 647
See SHIP. 3.

DESERTION — Discontinuance of cohabitation under separation deed—Offer to resume cohabitation by wife—Married Women (Maintenance in Case of Desertion) Act 1886 - - - - - - 418
See HUSBAND AND WIFE.

DISCLAIMER—Leasehold—Bankruptcy - 433
See BANKRUPTCY. 5.

DISCOVERY—Production of documents—Persons not parties to action - - 241
See PRACTICE. 8.

—— Inspection of documents—Documents referred to in answer to interrogatories—Order for inspection without second deposit of £5 - - - 707
See PRACTICE. 17.

DISCRETION—Public Worship Regulation Act, 1874—Discretion of bishop to stop proceedings under Act - - 48
See ECCLESIASTICAL LAW.

DISMISSAL OF ACTION—Trial—Default of appearance of plaintiff - - 233
See PRACTICE. 6.

EASEMENT—*Right of Way—Servient and Dominant Tenement—Owner of both Tenements—Mortgage of Servient Tenement without reservation of Right—Implied Reservation—Will—Devise—Implied Grant.*] A testatrix was the owner of two adjoining houses, A and B, which were situate back to back. There was a passage leading from house A (which the testatrix occupied) through house B (which she let) to a street; and she used this passage, which was not a way of necessity, from time to time but not continuously, as a way

EASEMENT—*continued*

to the street. In 1882 she mortgaged house B without reserving any right of way through this passage; and she died in 1886, having by her will, dated in the same year, devised house A to the plaintiff's predecessor in title, and house B to the defendant; the will contained no words descriptive of or appropriate to any right of way through the passage. At the death of the testatrix the mortgage was still subsisting; but after her death the defendant paid off the mortgage on house B, and took a reconveyance of the property comprised in the mortgage. The plaintiff having brought an action to recover damages from the defendant for trespass in stopping up the passage and preventing its user by the plaintiff:—*Held*, by A. L. Smith and Grantham, JJ., first, that as no right of way was reserved by the mortgage, and the way through the passage was not a way of necessity, all right of way through the passage was extinguished by the mortgage; and secondly, that no right of way through the passage passed to the plaintiff's predecessor in title under the will, and accordingly that on both these grounds the action was not maintainable. Upon appeal, the Court (Lindley, Fry, and Lopes, L.JJ.), without deciding whether or not any right of way passed under the will to the plaintiff's predecessor, *held*, that, as the plaintiff and defendant were both voluntoers, the plaintiff had no equity to deprive the defendant of the larger estate which she had obtained by virtue of the reconveyance, and that the appeal must be dismissed, subject to the right (if any) of the plaintiff to redeem the mortgage. TAWS *v.* KNOWLES - - - - C. A. 564

ECCLESIASTICAL LAW—*Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 8, 9—*Bishop's Discretion to stop Proceedings on Representation—"After considering the whole circumstances of the case"—Refusal or Excess of Jurisdiction—Mandamus.*] Sect. 8 of the Public Worship Regulation Act, 1874, provides that if, in the case of cathedral churches, any three inhabitants of the diocese, who are qualified as prescribed and have made the prescribed declaration, shall be of opinion that in such church any alteration in, or addition to, the fabric, ornaments, or furniture thereof, "has been made without lawful authority," or that any decoration forbidden by law "has been introduced into such church," they may send a representation in the prescribed form to the bishop of the diocese. By s. 9, where a representation has been sent to the bishop under s. 8, he shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act, "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion," &c. A representation was sent to the Bishop of London complaining that the Dean and Chapter of St. Paul's Cathedral Church had set up on a reredos in that church a figure of our Lord upon the Cross in a conspicuous position immediately above the communion table, so as to have the appearance of an altar crucifix; and a figure of the Virgin

ECCLESIASTICAL LAW—*continued.*

with the Child in her arms, in a conspicuous position above the figure of our Lord; that each of such figures tended to encourage ideas and devotions of an unauthorized and superstitious kind; that each of them had in fact encouraged ideas and devotions of an unauthorized and superstitious kind; that superstitious regard and reverence had in fact been paid to them, and that they were both illegal. The bishop replied that, having in pursuance of the statute considered the whole circumstances attending the representation, he was of opinion that proceedings should not be taken, stating as his reasons that the questions raised by this representation were in substance identical with those raised by a former representation made by Allcroft and others against the Dean and Chapter of St. Paul's, and that an application by Allcroft and the others for a mandamus to compel the bishop to act in furtherance of the proceedings as prescribed by the statute, having been refused by the Court of Appeal, was then pending in the House of Lords. The former representation differed from this second representation only in the respect that the second representation alleged that the figures complained of had in fact encouraged ideas and devotions of an unauthorized and superstitious kind, and that superstitious regard and reverence had in fact been paid to them. On an application by the present complainants for a mandamus to compel the bishop to act in furtherance of the proceedings as prescribed by the statute:—*Held*, by Hawkins, J., that ss. 8 & 9 of the Public Worship Regulation Act, 1874, did not impose upon the bishop any duty to take cognizance of the new matter alleged in the second representation as constituting a new offence, and that, the bishop having stated that he had considered the whole circumstances of the case, the application for a mandamus ought to be refused: *Held*, by Stephen, J., dissenting, that the bishop's reply to the representation shewed that he had not sufficiently considered the whole circumstances of the case within the meaning of s. 9, and therefore that the application for a mandamus ought to be granted. THE QUEEN *v.* THE BISHOP OF LONDON. LEIGHTON'S CASE - - - 48

ESTOPPEL—*Company—Share Certificate—Damages.*—A share certificate, issued by a company under their corporate seal, stating that the person named in it is the owner of a specified number of shares in the company, estops the company from afterwards denying his title to the shares; and, if the company are unable to give him the shares, they are liable in damages by reason of their statement. *Semble*, that in such a case an action against the company for damages can be maintained either by the person named in the certificate or by a purchaser from him. *Bishop* v. *Balkis Consolidated Co.* (25 Q. B. D. 512) distinguished. *Derry* v. *Peek* (14 App. Cas 337) explained. TOMKINSON *v.* BALKIS CONSOLIDATED COMPANY - - - - C. A. 614

—— Locomotive on highway—Negligent management of by bailee—Liability of owner of traction engine - - - 403
See LOCOMOTIVE ON HIGHWAY.

EVIDENCE—Onus of proof—Innkeeper—Loss of guest's property - - - 11
See INNKEEPER.

—— Breach of promise of marriage—Corroboration of promise—Omission to annex letters, effect of—32 & 33 Vict. c. 68, s. 2. - - - - - 534
See BREACH OF PROMISE OF MARRIAGE.

EXECUTION—Receivership order—Date from which receivership order takes effect.
See PRACTICE. 2. [73

EXTRADITION—Embezzlement or misappropriation - - - - 122
See CRIMINAL LAW.

FORFEITURE—Relief—Breach of covenant—Underlessee of part of premises - 98
See LANDLORD AND TENANT. 2.

—— Lease—Proviso for forfeiture on bankruptcy of lessee or assigns—Assignment of lease—Subsequent bankruptcy of lessee - - - - 394
See LANDLORD AND TENANT. 3.

—— Breach of covenant—"Compensation"—Landlord and Tenant - - 542
See LANDLORD AND TENANT. 5.

FRANCHISE—Title to a franchise—Infringement of patent—County court jurisdiction - - - - - 263
See COUNTY COURT. 3.

FRIENDLY SOCIETY—*Misappropriation of Property—Conviction under Statute—Imprisonment for Default in Payment—Conviction and Punishment a bar to subsequent Action—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 16, *sub-s.* 9.] By s. 16, sub-s. 9, of the Friendly Societies Act, 1875, if any person, having property of a friendly society in his possession, withholds or misapplies the same, he shall be liable on summary conviction to a penalty not exceeding 20*l.* and costs, "and to be ordered to deliver up all such property, or to repay all moneys applied improperly, and in default of such delivery or repayment, or of the payment of such penalty and costs, to be imprisoned for any time not exceeding three months." Where, under sub-s. 9, a penalty was imposed upon the respondent for misapplying the moneys of a friendly society, and an order to repay such moneys having been made against him, he was imprisoned for default in paying the penalty and repaying the moneys:—*Held* (affirming the decision of the Queen's Bench Division), that the order to repay the moneys misapplied by the respondent, and the imprisonment, which was execution upon it, were a bar to an action subsequently brought by the society for the recovery of the same moneys. VERNON *v.* WATSON [C. A. 288.

HIGHWAY—*Surveyor—Cutting Trees near Highway*—5 & 6 *Wm* 4, *c.* 50, *s.* 65—"*Lopping*," *Construction of.*] By 5 & 6 Wm. 4, c. 50, s. 65, justices of the peace have power to order and direct that trees growing near a highway, which prejudice the highway by excluding the sun and wind therefrom, be "pruned or lopped"; and, if the owner of the trees makes default in comply-

HIGHWAY—*continued.*

ing with the order, the surveyor of highways for the district is authorized to "prune and lop" such trees:—*Held*, that the term "lop," as used in this section, meant to cut off the branches laterally, and, therefore, that the section did not give any power or authority to the justices or the surveyor in respect of cutting off the tops of any trees. UNWIN *v.* HANSON - - C. A. 115

HOUSE—Rateable hereditament—Occupation of part of house - - - 436
See POOR-RATE.

HUSBAND AND WIFE—*Desertion—Discontinuance of Cohabitation under Separation Deed—Offer to resume Cohabitation by Wife—Married Women (Maintenance in Case of Desertion) Act*, 1886 (49 & 50 *Vict. c.* 52), *s.* 1.] A husband and wife were living apart under a separation deed, by which the husband covenanted to pay seven shillings a week to a trustee for the wife. The husband having ceased to make the payments required by the deed, the wife offered to resume cohabitation, but the husband refused to do so. The wife then applied to magistrates for an order upon the husband for maintenance under the Married Women (Maintenance in Case of Desertion) Act, 1886, and they made an order upon him for payment of seven shillings a week:—*Held*, that, in order to constitute desertion within the Act, the parties must be living together as man and wife when the desertion takes place; that the husband's refusal of the wife's offer to resume cohabitation did not constitute desertion; and that there was therefore no evidence of desertion, and the order of the magistrates was wrong. THE QUEEN *v.* LERESCHE - - - - C. A. 418

2. —— *Separate Estate of Wife—Restraint on Anticipation—Judgment against Wife—Liability after death of Husband—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 4.] A married woman, who had separate property subject to a restraint on anticipation, incurred a pecuniary liability. After the death of her husband she was sued, and judgment was recovered against her, limited to her separate property not subject to any restriction against anticipation. The execution creditor having obtained an order for a receiver of the income of such property:—*Held*, affirming the judgment of the Queen's Bench Division, that the removal, by reason of the death of the husband, of the restraint on anticipation did not make the property liable, and that the order must be discharged. PELTON BROTHERS *v.* HARRISON [C. A. 422

INCOME TAX—Deduction from profits—Brewers carrying on business of bankers and money-lenders - - - 1
See REVENUE.

—— Trading business carried on in England with branches abroad—Profits earned abroad and not remitted to England
See REVENUE. 2. [378

INFANT—*Apprenticeship Deed—Covenant to pay Premium—Liability.*] In an action by the master of an apprentice upon a covenant in the apprenticeship deed by the apprentice, who was an infant at the date of the deed, for the payment of the balance of the premium three years and a half after that date, the jury found that the deed was a provident and proper arrangement for the infant, and necessary, if he wished to learn the business to which he was apprenticed, that the premium was fair and reasonable, and that instruction had been given under the deed:—*Held*, that the liability of the infant for necessary instruction duly provided stood upon the same footing as that for ordinary necessaries supplied to him, and that consequently the fact that he had entered into a covenant under seal for the payment of the premium did not prevent him from being liable for the amount claimed. WALTER *v.* EVERARD - - - C. A. 369

INFORMATION—Adulteration—Milk in course of delivery under a contract of sale—Delivery in several cans—Separate informations in respect of sample from more than one can - - - 304
See ADULTERATION. 2.

INNKEEPER—*Liability—Loss of Guest's Property—Onus of Proof*—26 & 27 *Vict. c.* 41, *s.* 1.] The plaintiff arrived early in the morning at the defendants' hotel (which was entitled to the benefit of 26 & 27 Vict. c 41) and asked for a bedroom. He was told that the hotel was full, but that there was one room then vacant, which had been engaged by a lady and gentleman who were expected to arrive in the course of the day, and that he could make use of it for the purpose of washing and dressing. He was then shewn to the room, and his luggage, including a dressing-bag, was taken into it by the hotel porter. After entering the room the plaintiff opened the bag and took out of it a stand, which contained brushes and other articles of the toilet. In the drawer of the stand were some valuable trinkets. The plaintiff placed the stand on the dressing-table in the room When he had finished washing and dressing he went downstairs to the coffee-room and had breakfast. He left the door of the bedroom unlocked, and he left the stand of the dressing-bag just as it was on the table He paid for his breakfast, left the hotel, and did not return till about midnight. About 9 P.M. the lady and gentleman, who had engaged the room, arrived, and were shewn to it by the page-boy of the hotel. By the direction of the head porter the boy moved all the plaintiff's luggage, including the stand, out of the room into the corridor, and left it there. When the plaintiff returned to the hotel another bedroom, which had meanwhile become vacant, was given to him, and his luggage was brought from the corridor into this room. The next morning the plaintiff discovered that his trinkets had been stolen from the drawer of the stand. He brought an action against the defendants for damages for the loss of the trinkets. There was no evidence to shew whether the trinkets were stolen while the stand was in the bedroom or after it had been placed in the corridor:—*Held* (by Lord Esher, M.R., and Bowen, L.J.), that the plaintiff was received as a guest into the hotel, and that the relation of innkeeper and guest continued until a reasonable time after

INNKEEPER—*continued.*

the plaintiff's goods had been placed in the corridor, and that, if the trinkets were stolen while the stand was in the bed-room, there was contributory negligence on the part of the plaintiff; but that, if they were stolen while the stand was in the corridor, the loss was due solely to the negligence of the defendants in placing it there: But, *held*, that, inasmuch as it was not proved whether the trinkets were stolen in the bedroom or in the corridor, the defendants were, under s 1 of the Act, liable up to the amount of 30*l.*, because they could not discharge the onus which lay on them of shewing that the plaintiff's negligence had contributed to the loss: *Held*, also, that beyond the amount of the 30*l.* the defendants were not liable, because, for the same reason, the plaintiff could not discharge the onus which was cast upon him by s. 1 of shewing that the loss had occurred "through the wilful act, default or neglect" of the defendants: *Held*, by Fry, L.J, that the plaintiff was not a guest in the hotel at the time when the loss occurred, and that, therefore, the defendants were not liable at all. Decision of A. L. Smith, J., reversed. MEDAWAR *v.* GRAND HOTEL COMPANY C. A. 11

INTEREST—Bankruptcy—Proof of debt—Debt payable in future with interest in meantime - - - - 574
See BANKRUPTCY. 6.

INTERPLEADER—Time for appealing—Interpleader issue, judgment on—Interlocutory order - - - - 502
See PRACTICE. 13.

INTIMIDATION—Trade union—Threat of strike unless employer ceases to employ workmen not members - - - 545
See CRIMINAL LAW. 4.

JUDGMENT—Trial—Default of appearance of plaintiff—Form of entry of judgment
See PRACTICE. 6. [233

JURISDICTION—City of London Court—Defendant employed in the city - 267
See LONDON.

JUSTICE—Company—List of members—Default in forwarding list to registrar—Mandamus to hear application for summons—Appeal to Court of Appeal - 588
See PRACTICE. 16.

LANDLORD AND TENANT—*Lease—Breach of Covenant to deliver up Premises in Repair—Measure of Damages*] The general rule with regard to the measure of damages in an action for breach of a covenant by a lessee to deliver up the demised premises in repair is that such damages are the cost of putting the premises into the state of repair required by the covenant. Such measure of damages is not affected by the fact that, by reason of the terms of a lease granted by the lessor to another lessee from the expiration of the defendant's term, the lessor is at the time of action brought no worse off than he would have been if the defendant's covenant had been performed. JOYNER *v.* WEEKS C. A. 31

2. —— *Lease—Covenant to Repair—Ejectment for Breach—Relief against Forfeiture—Underlessee of part of Premises—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.] The provisions of s. 14 of the Conveyancing and Law of Property Act, 1881, enabling the Court to grant relief to lessees against forfeiture for breach of covenant, do not enable an underlessee of a part of the demised premises to obtain relief for breach of a covenant to repair contained in the head lease. BURT *v* GRAY - - - - - - - 98

3. —— *Lease—Proviso for Forfeiture on Bankruptcy of Lessee or Assigns—Assignment of Lease—Subsequent Bankruptcy of Lessee*] In a lease of a house for a term of years there was a covenant by the lessee not to assign the premises without the consent in writing of the lessor, "such consent not to be withheld to a respectable and responsible tenant," and a proviso for re-entry if (inter alia) "the lessee, his executors, administrators or assigns should become bankrupt." The lessee assigned the lease, with the consent of the lessor, and subsequently to such assignment became bankrupt:—*Held*, by Wright, J., that the proviso for re-entry referred only to the bankruptcy of the person who for the time being was possessed of the term, and that consequently no forfeiture had been incurred. *Quære*, whether the right to enforce a forfeiture on the bankruptcy of the lessee is affected by an annulment of the bankruptcy. SMITH *v* GRONOW [394

4. —— *Mortgage—Subsequent Lease by Mortgagor—Notice to pay Rent to Mortgagee—Possession of Tenant after Notice.*] A mortgagor let the mortgaged premises subsequently to the mortgage. The mortgagees gave a notice to the tenant informing him of the existence of the mortgage and requiring him to pay to them the rent thereafter to accrue due. The tenant continued in possession after the receipt of the notice, but there was no other circumstance from which an agreement for a tenancy could be inferred:—*Held*, affirming the judgment of the Queen's Bench Division, that the mere fact of the tenant remaining in possession after notice to pay rent to the mortgagees was not evidence of an agreement that he should become tenant to the mortgagees. TOWERSON *v.* JACKSON - - - C. A. 484

5. —— *Breach of Covenant in a Lease—Ejectment—Compensation—Solicitor's and Surveyor's Charges of Preparing Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.] The "compensation" for breach of covenant which a lessee is liable to pay under s. 14 of 44 & 45 Vict c. 41, does not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by that section. SKINNERS' COMPANY *v.* KNIGHT - C A. 542

6. —— *Compensation for Improvements—Charge on Holding—Executors of deceased Tenant for Life—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 29, 61.] Under the Agricultural Holdings (England) Act, 1883, the executors of a landlord, tenant for life, who have

LANDLORD AND TENANT—*continued.*

been compelled under the Act to pay compensation for improvements to an outgoing tenant, who had claimed compensation and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid. IN RE THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883. GOUGH *v.* GOUGH. C. A. 665

7. —— *Covenant for Quiet Enjoyment.*] The defendant leased to the Parkside Mining Company a mine for the purpose of being worked as an iron mine; subsequently, he leased to the plaintiffs an adjoining mine for the same purpose, the lease to the plaintiffs containing a covenant for quiet enjoyment of the mine, "without any interruption or eviction by the lessor, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under him." The Parkside Company, while properly working their mine under the terms of their lease from the defendant, struck a "feeder," with the result that a large body of underground water, the existence of which was unsuspected and the nature of which was uncertain, flooded their mine, and rising in the levels found its way through a natural fissure in the limstone rock into the plaintiffs' mine, which was on a higher level, and caused considerable damage. The plaintiffs having brought an action to recover damages for breach of the covenant for quiet enjoyment:—*Held*, that the interruption to the working of the plaintiffs' mine by the irruption of water not having been caused by any direct act of interruption, or by any act the consequences of which either were foreseen or ought to have been foreseen by the defendant at the time when the covenant was entered into, was not an interruption within the meaning of the covenant, and that the defendant was not liable. HARRISON, AINSLIE & CO. *v.* LORD MUNCASTER. [C. A. 680.

—— Charity Commissioners — Effect of lease granted by charitable trustees for a period exceeding twenty-one years without the approval of the Charity Commissioners - - - - 277
See CHARITY.

—— Covenant for quiet enjoyment—Market—Disturbance—Sale on land leased
See MARKET. [384

LICENSING ACTS—*Beerhouse—Change of Occupation — Transfer — Grant of Licence to "New Tenant"—Jurisdiction of Justices—9 Geo. 4, c. 61, s. 14.*] By 9 Geo. 4, c. 61, s. 14, if the tenant of a beerhouse being duly licensed "shall remove from or yield up the possession of the house specified in the licence . . . it shall be lawful for the justices assembled at a special session, to grant to any new tenant or occupier of any house so becoming unoccupied . . . a licence to sell exciseable liquors by retail . . . provided always that every such licence shall continue in force only from the day on which it shall be granted until (elsewhere than in Middlesex or Surrey) the 10th day of October then next ensuing." The tenant of a beerhouse, being duly licensed, gave up possession of the house on September 2, 1890, and on September 5, another person entered into

LICENSING ACTS—*continued.*

occupation as tenant of the house in his stead. The new tenant applied for and obtained at a special transfer session, a licence under 9 Geo. 4, c. 61, s. 14, to himself, as being the "new tenant or occupier of the house having so become unoccupied," for the period ending on October 10, 1890. He did not apply for a renewal of the licence to the general annual licensing meeting on September 27, 1890. The licence having expired, he, on January 3, 1891, applied at another special transfer session for the grant to himself of a licence for the year ending October 10, 1891:—*Held*, affirming the decision of the Queen's Bench Division ([1891] 1 Q. B. 718), that the justices had no jurisdiction to grant the application. THE QUEEN *v.* POWELL AND OTHERS, JUSTICES OF THE PEACE FOR THE HUNDRED OF SWANSEA - - - - C. A. 693

LIMITATIONS, STATUTE OF (21 *Jac.* 1, *c.* 16, *s.* 3)—*Cause of Action.*] The plaintiff lent money to the defendant under a written agreement, which recited an agreement for a loan for five years, "subject to the power to call in the same at an earlier period in the events hereinafter mentioned." The defendant agreed to pay interest quarterly, and the plaintiff agreed not to call in the money for five years if the defendant should regularly pay the interest. And it was provided that if the defendant should make default in payment of any quarterly payment of interest for twenty-one days the plaintiff might call in the principal. No interest was ever paid. The plaintiff commenced his action to recover the principal and interest within six years from the end of the term of five years:—*Held* (affirming the decision of Day and Lawrance, JJ.), that the Statute of Limitations was a good defence, for that the time began to run from the earliest time at which the plaintiff could have brought her action—i.e., twenty-one days after the first instalment of interest became due. *Hemp* v. *Garland* (4 Q. B. 519) approved. REEVES *v.* BUTCHER - - - - C. A. 509

LOCAL GOVERNMENT — *Nuisance — Smelting Works—Right of Local Board to sue as Owners of Property affected—Right of Local Board to act as Relators in respect of Public Nuisance—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 334.] A local authority may act as relators in an action brought by the Attorney-General for the purpose of abating a public nuisance, and may themselves maintain an action for damages for a nuisance affecting property of which they are the actual owners. The provision in s. 334 of the Public Health Act, 1875, that nothing in that Act shall extend to certain businesses therein specified, exempts their proprietors only from the liabilities created and penalties imposed by that Act, and does not relieve them from liability for a public nuisance in a suit brought by the Attorney-General for its abatement, nor from their ordinary common law liability to an owner whose property is injuriously affected by it. ATTORNEY-GENERAL *v.* LOGAN - - - - - 100

2. —— *Metropolis—Nuisances Removal Act*, 1863 (26 & 27 *Vict. c.* 117), *s.* 2—*Unsound Meat —Ownership of Unsound Meat intended for Hu-*

LOCAL GOVERNMENT—*continued.*

man Food and deposited with Salesman—Exposure for Sale, whether necessary to constitute Offence] By s. 2 of the Nuisances Removal Act, 1866, power is given to an inspector of nuisances to examine and inspect (inter alia) any carcase or meat "exposed for sale or deposited in any place for the purpose of sale or of preparation for sale," and if such meat appears to him to be unsound to seize and carry it away in order to have it dealt with by a justice, who, if it appears to him to be unsound may make an order for its destruction; and a penalty is imposed upon "the person to whom such meat belongs or did belong at the time of sale or of exposure for sale, or in whose possession or on whose premises the same is found." The appellant, a farmer in the country, sent to a salesman in London meat which to his knowledge was unsound for the purpose of its being sold and used as human food. The salesman did not expose the meat for sale, but put it aside, and called the attention of the respondent, an inspector of nuisances, to it; the respondent seized the meat and obtained a justice's order for its destruction. The appellant having been convicted of being the owner of unsound meat "unlawfully deposited for the purpose of sale and intended for the food of man": —*Held*, that in order to convict the owner of an offence under the above section there must be either a sale or an exposure of the meat for sale, and that the conviction was therefore bad. BARLOW *v.* TERRETT - - - - 107

3. —— *Pauper Lunatic—Expenses of Maintenance — County Lunatic Asylum — Additional Charge—Power to fix Amount of Charge—Committee of Visitors—Arbitration*—16 & 17 *Vict. c.* 97, *s.* 54—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss* '62, 86.] By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 86, sub-s. 4: "Where at the passing of this Act a borough with a separate court of quarter sessions, not being a county borough, &c., contracts with the quarter sessions of the county in which the borough is situate for the reception of the lunatics of the borough in the asylum of the county, such borough shall, on the determination of such contract, cease to have power to build a lunatic asylum, and, subject to the enactments providing for an additional charge for the maintenance of lunatics in cases where no contribution has been made towards the cost of building and furnishing an asylum, shall be liable to contribute to the county rate of the county in respect of such lunatic asylum in like manner as the rest of the county":—*Held*, that the meaning of the above clause must be taken to be that the committee of visitors of a county lunatic asylum have no longer the power which they formerly possessed, under s. 54 of the Act, 16 & 17 Vict. c. 97, of fixing the amount to be paid for the maintenance of a pauper lunatic sent to them from a borough which has not contributed towards the cost of building and furnishing the asylum; but, in case of a difference, the borough authorities are entitled to have the amount due ascertained by arbitration under s. 62 of the Local Government Act, 1888 HOWLETT *v.* MAYOR, &c., OF MAIDSTONE - - - - - C. A. 110

LOCAL GOVERNMENT—*continued.*

4. —— "*Streets*"—"*Passages*"—*Local Authority—Bye-laws, Power to make—Bye-law prescribing Width of New Streets—Validity—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 4, *s.* 157, *sub-s.* 1.] An urban authority made a bye-law under the Public Health Act, 1875, directing that all new streets should be of a width of not less than ten feet. Certain ways existed communicating with the backs of the houses, and used by the urban authority, who did the scavenging of the town, for the purpose of obtaining access to privies and ashpits in order to remove the contents thereof. Plans were submitted for approval to the urban authority shewing ways such as above described of the width of six feet, and the urban authority, who had published a bye-law under the Public Health Act, 1875, prescribing ten feet as the minimum width of new streets, refused to approve such plans:—*Held*, discharging a rule for a mandamus to compel the approval of the plans, that the ways in question were "passages" within the meaning of s. 4 of the Public Health Act, 1875, and therefore were "streets" within the meaning of that section, and therefore the urban authority had power by s. 157, sub-s. 1, to make bye-laws with respect to their width and construction, and the bye-law was valid. THE QUEEN *v.* THE LOCAL BOARD OF GOOLE - - - - 212

5. —— *Streets—Recovery of Expenses—Public Highway—Sewering, Paving, &c.—Liability of Frontager—Order of Local Government Board declaring Road to be a Street—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 276] The appellant was summoned under s. 150 of the Public Health Act, 1875, for nonpayment of expenses incurred by the rural authority in sewering, paving, &c., a road on which his premises abutted. An order of the Local Government Board, under s. 276, had declared s. 150 to be in force as to the road in question, which the order also declared to be a street. The road ran from a turnpike road to a bridge, where it passed into another parish, and was from that point repaired by the local board of that parish as a highway. It was about 900 feet long. It had on the south side several houses, including the appellant's house, abutting on it; on the north there were none for 785 feet from the turnpike road. For the rest of its course it was bounded on that side by a sewage farm belonging to the rural authority, on which were two buildings. It was a public highway. There was no evidence of formal dedication of the road, but there was evidence of its use as a public highway since 1835, and some evidence before 1835, but none inconsistent with its having been then an occupation road or footpath The justices held the order of the Local Government Board conclusive, that the road was a street, and further held, that, although in their opinion it was not a street in the popular acceptation of the word, it was a street within the meaning of s. 4 of the Public Health Act, 1875. On a case stated:—*Held*, that the justices were wrong in holding that the order of the Local Government Board was conclusive that the road was a street, but that by the definition in s. 4 it was a "street" within the meaning of s. 150,

LOCAL GOVERNMENT—*continued.*

and the appellant was liable. Judgments of the Court of Appeal in *Corporation of Portsmouth* v. *Smith* (13 Q. B. D. 184), and in *Jowett* v. *Local Board of Idle* (W. N. (1888), p. 87) followed. *Reg.* v. *Burnup* (50 J. P. 598) not followed. FENWICK *v.* RURAL SANITARY AUTHORITY OF CROYDON UNION - - - - 216

—— Market — Disturbance — Lease by urban authority—Right to sell cattle - 384
See MARKET.

—— Order for abatement of nuisance—Mandamus to compel magistrate to state case—Appeal to Court of Appeal—"Criminal cause or matter" - 428
See PRACTICE. 11.

LOCOMOTIVE ON HIGHWAY—*Negligent Management of by Bailee—Liability of Owner of Traction Engine—Master and Servant—Locomotives Act*, 1865 (28 & 29 *Vict. c.* 83), *ss.* 3, 7.] The defendant, who was the owner of a traction engine, to which his name and address were affixed, as required by the Locomotives Act, 1865, s. 7, let the same for three months. Through the negligent management of the engine whilst it was being used upon a highway by the hirer, personal injuries were occasioned to the plaintiff, who was being driven in a carriage upon the highway:—*Held*, that the defendant was not liable in respect of such injuries. *Stables* v. *Eley* (1 C. & P. 614), as reported, disapproved of. SMITH *v.* BAILEY - C. A. 403

LONDON—*City of London Court—Jurisdiction—Defendant Employed in the City—London (City) Small Debts Extension Act*, 1852 (15 & 16 *Vict. c. lxxvii.*), *s.* 39—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 185.] The jurisdiction given to the City of London Court, by s. 39 of 15 & 16 Vict. c. lxxvii., over defendants who do not dwell or carry on business, but only "have employment" within the City, is not taken away by the County Courts Act, 1888. KUTNER *v.* PHILLIPS [267

LUNATIC PAUPER—Expenses of Maintenance—County Lunatic Asylum—Additional Charge - - - - 110
See LOCAL GOVERNMENT. 3.

MALICIOUS PROSECUTION—*Reasonable and Probable Cause—Honest belief of Prosecutor—Reasonable care in informing himself of true facts—Evidence of Malice.*] In an action for malicious prosecution the jury found, in answer to specific questions; first, that the defendant did not take reasonable care to inform himself of the true facts of the case; secondly, that the defendant honestly believed in the full charge which he laid before the magistrates; thirdly, that the defendant was actuated by malice and indirect motives in the proceedings taken against the plaintiff. The judge held on these findings that there was an absence of reasonable and probable cause, and judgment was entered for the plaintiff. On appeal:—*Held*, by Cave, J., that as the facts were not in dispute the judge was wrong in leaving the first question to the jury; that in view of the finding of the jury as to the honest belief of the defendant, and in the absence of

MALICIOUS PROSECUTION—*continued.*

evidence of express malice, the jury could not reasonably draw the inference that the defendant was actuated by indirect motives; and that consequently the defendant was entitled to judgment:—By A. L. Smith, J., that the judge was right in asking the jury whether the defendant took reasonable care to inform himself of the true facts, that the findings of the jury when taken together and applied to the facts given in evidence amounted to a finding that the defendant was actuated by malice, that there was evidence of malice on which the jury could act, and that the plaintiff was entitled to judgment:—By the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.), affirming the judgment of Cave, J., that although the absence of reasonable and probable cause is some evidence from which malice may be inferred, the jury, by their finding as to the honest belief of the defendant, had negatived any inference which depended solely upon such evidence; and that in the absence of any other evidence of indirect motive the finding of the jury that the defendant was actuated by malice could not be supported. BROWN *v.* HAWKES [C. A. 718

MANDAMUS—Ecclesiastical law—Public Worship Regulation Act, 1874—Bishop's discretion to stop proceedings on representation - - - 48
See ECCLESIASTICAL LAW.

—— Army—Pay and retiring allowances—Royal warrant—Secretary of State for War - - - - - 326
See ARMY.

—— Appeal to Court of Appeal—Refusal of magistrate to state case—"Criminal cause or matter" - - - 428
See PRACTICE. 11.

—— Company—List of members—Default in forwarding list to registrar—Mandamus to hear application for summons—Appeal to Court of Appeal - - 558
See PRACTICE. 16.

MARKET—*Disturbance—Liability to Penalty—Sale of Cattle—Lease by Corporation—Sale on Land Leased—Covenant for Quiet Enjoyment—Right to establish Market—"Prescribed Limits"—Markets and Fairs Clauses Act*, 1847 (10 & 11 *Vict. c.* 14), *s.* 13—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 166.] The appellant, a cattle salesman, occupied premises, which he used for the sale of cattle, under leases granted by the corporation of a borough, containing covenants for quiet enjoyment. Afterwards the corporation, as the urban authority, established a cattle market in the borough, and published a list of tolls. The appellant was convicted for selling cattle, for which no toll had been paid, in his sale yard, within the borough, but not within the limits of the market. On a case stated:—*Held*, that the corporation had not derogated from their grant by establishing a market, that the appellant had not by virtue of the leases acquired any right to sell cattle within the meaning of s. 166 of the Public Health Act, 1875, which the urban authority could not interfere with by establishing a market, and was therefore liable to a penalty

MARKET—*continued.*

under s. 13 of the Markets and Fairs Clauses Act, 1847. *Held*, also, that, by the use of the words "within their district" in s 166 of the Public Health Act, 1875, the district of the urban authority was constituted "the prescribed limits" within the meaning of s 13 of the Markets and Fairs Clauses Act, 1847. Upon the argument of a special case only one counsel is heard on each side, except when the case is stated upon an order of sessions, when it is brought before the Court upon an order nisi to quash, and there all the counsel instructed on both sides may be heard. SPURLING *v.* BANTOFT - - 384

MARRIAGE SETTLEMENT—Agreement for—Bill of sale - - - - 192
See BILL OF SALE.

—— Power of appointment—Duties on settlements of personal property—Instrument not taking effect as a will - - 526
See REVENUE. 3.

MASTER AND SERVANT—*Wages, Contract for Deductions from—Truck Act*, 1831 (1 & 2 *Wm.* 4, *c.* 37), *s.* 23—*Truck Amendment Act*, 1887 (50 & 51 *Vict. c.* 46), *s.* 6.] The Truck Act (1 & 2 Wm. 4, c. 37), s. 23, provides that an employer may supply to an artificer in his employ any medicine or medical attendance, and may make deduction from his wages in respect thereof, provided that it is made under a contract in writing signed by the artificer. By the Truck Amendment Act (50 & 51 Vict c. 46), s. 6, "No employer shall, directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman any terms as to the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid to the workman are or is to be expended. . ." The plaintiff, a railway porter, on entering the service of the defendants signed an agreement, one of the conditions of which was that certain deductions should be made weekly from his pay as his contribution to a sick and funeral allowance fund; the fund was for the benefit of the defendants' servants, and was managed on their behalf by the defendants. Deductions were made weekly from the plaintiff's wages until he left the defendants' service, when he brought an action to recover the amount of the deductions as having been made in contravention of the provisions of the Truck Acts. During the period in respect of which the plaintiff sued, a larger sum had been paid out of the fund for medical attendance on the plaintiff and his wife than the total amount of his contributions which he sought to recover:—*Held*, that s. 6 of the Truck Amendment Act, 1887, did not apply to written contracts excepted by s. 23 of the Truck Act, 1831, from the operation of that Act; that the deductions were therefore legally made, and that the plaintiff was not entitled to recover. LAMB *v.* GREAT NORTHERN RAILWAY COMPANY - - 281

—— Locomotive on highway—Negligent management of by bailee—Liability of owner of traction engine - - 403
See LOCOMOTIVE ON HIGHWAY.

MASTER AND SERVANT—*continued.*

—— Bailor and bailee—Liability of bailee for hire for negligence of servant - 413
See BAILMENT.

METROPOLIS—MANAGEMENT ACTS—*Street Improvement Expenses—Church Building Acts—Site for Church—Consecration of Part of Site—Vesting of Site in Incumbent—Ecclesiastical Commissioners*—18 & 19 *Vict. c.* 120, *ss.* 105, 250; 25 & 26 *Vict. c.* 102; 8 & 9 *Vict. c.* 70, *s.* 13.] By 8 & 9 Vict. c. 70 (Church Building Acts Amendment Act), s. 13, the "freehold of the site of every church" of which the Commissioners therein mentioned shall accept a conveyance under the Church Building Acts (as to any church not yet consecrated, when the same shall be consecrated), shall vest in the incumbent. Land having been conveyed under the Church Building Acts to the Ecclesiastical Commissioners as a site for a church, a church was afterwards erected on a part of the land, and the church and part only of the land were consecrated:—*Held*, that upon such consecration, the whole of the land so conveyed to the Commissioners vested in the incumbent; that the Commissioners ceased to be the owners of it, and were therefore not liable under the Metropolis Management Acts, 1855 and 1862, to contribute in respect of it towards the cost of paving a new street. BOARD OF WORKS FOR PLUMSTEAD DISTRICT *v.* ECCLESIASTICAL COMMISSIONERS FOR ENGLAND - - - - - 361

2. —— *Management Acts—General Line of Buildings—County Council—Railway Company—Compulsory Powers—Order of Justice for demolition of Building—Effect of Acquisition of Land by Railway Company under special Act passed subsequently to Metropolis Management Amendment Act*, 1862—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*Metropolis Management and Buildings Acts Amendment Act*, 1882 (45 & 46 *Vict. c.* 14), *s.* 10—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 40, *sub-s.* 8.] A railway company was empowered by a special Act passed subsequently to the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), to make under a street in London a subway "with all necessary works connected therewith," and to take and use such of the lands delineated on the deposited plans, and described in the deposited books of reference, as might be required for that purpose. The company built in the street within the limits of deviation a station, a part of which projected beyond the general line of buildings. This station was necessary for the purposes of the railway, and apart from the provisions of the Metropolis Management Acts was unobjectionable, but it could have been erected within the general line of buildings without any inconvenience except a considerable increase of expense:—*Held* (affirming the decision of A. L. Smith and Grantham, JJ.), that the station being necessary, the special Act empowered the company to make it upon any of the scheduled lands lying within the limits of deviation; that the effect was to repeal s. 75 of the Metropolis Management Amendment Act, 1862, so far as related to the station, and that there was therefore no jurisdiction to make an order under that

METROPOLIS—*continued.*

section for the demolition of the projecting part. CITY AND SOUTH LONDON RAILWAY COMPANY *v.* LONDON COUNTY COUNCIL - - C. A. 513

3. —— *Management Acts—House kept open for Music — Certificate of County Council — Unlicensed House—Penalty for keeping open without Certificate—"To be kept open"—41 & 42 Vict. c. 32, s. 12.*] The provisions of s. 12 of the Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), requiring for houses, rooms, or other places of public resort to be kept open for public dancing or music, a certificate from (now) the London County Council that such house, room, or place is in accordance with the regulations made by the council in pursuance of the Act, apply to houses not licensed under 25 Geo. 2, c. 36, or 6 & 7 Vict. c. 68. THE QUEEN *v.* HANNAY AND ANOTHER - - - - - 709

4. —— *Valuation—Valuation Lists—Totals of Gross and Rateable Values—Alteration of—Reduction in Values of Hereditaments—Valuation of Property (Metropolis) Act,* 1869 (32 & 33 *Vict. c.* 67), *ss.* 32, 34, 41.] By the Valuation of Property (Metropolis) Act, 1869, s. 6, the overseers of every parish to which the Act applies shall make and sign a valuation list of the rateable hereditaments in their parish, which list, by s. 14, shall be revised and finally approved by the assessment committee of the union, who shall thereupon cause the totals of the gross and rateable value on such list to be ascertained and inserted in the list. Sect. 32 gives to any ratepayer an appeal to quarter sessions against any decision of the assessment committee by which he is aggrieved; and an appeal is also given to any assessment committee, overseers, ratepayer, or body of persons authorized by law to levy rates, if they or he feel aggrieved by reason of the totals of the gross or rateable values of any parish being too high or too low. By s. 34 the quarter sessions on appeal "may confirm or alter the valuation list so far as it is questioned by the appeal." After the valuation lists in four parishes comprising a union had been duly made and approved, various ratepayers appealed against such lists on the ground that the gross and rateable values of specific hereditaments comprised therein were too high, and the quarter sessions reduced some of those values. No appeal was brought against the totals of the valuation lists, and no alteration in those totals was made by the quarter sessions:—*Held*, that the reduction, on appeal, of the values of the specific hereditaments comprised in the valuation lists of the parishes did not alter the total gross and rateable values appearing in such lists, which total values could only be altered by appealing against them. THE QUEEN *v.* GUARDIANS OF THE WOOLWICH UNION - - - - - 712

METROPOLITAN BUILDING ACTS—*Metropolitan Building Act,* 1855 (18 & 19 *Vict. c.* 122), *s.* 26—*General Paving (Metropolis) Act,* 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 72—*Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *s.* 119—*Street—General Line of Building—Projections—Pilaster encroaching on Public Footway.*] By 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), s. 72, power is given to the persons having the control of the pavements of streets in the metropolis to regulate or remove all projections from the fronts of houses which in their judgment are inconvenient or incommodious to passengers along the footways, and a penalty of not less than forty shillings nor exceeding five pounds is imposed upon any owner or occupier who does not immediately remove any such projection after notice so to do. By s. 119 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), it is enacted that if any projection placed in front of any house after the commencement of the Act shall be an annoyance in consequence of the same rendering less commodious the passage along any street, the vestry may give notice to the owner or occupier to remove such projection, and that if he shall neglect within fourteen days after the service of such notice upon him to remove such projection he shall forfeit a sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during which the projection continues after the date of his conviction. By s. 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), "The following rules shall be observed as to projections .... (2.) In any street or alley of a width greater than thirty feet any shop front may project ten inches and no more. (5.) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of .... cornices .... and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street except with the permission of the Metropolitan Board of Works." The appellant built upon the side of a public street, which was of a width greater than thirty feet, certain shops upon ground of which he was lessee, and erected against the fronts of the shops certain pilasters which projected into the street beyond the general building line to the extent of nine inches of the footway. The respondents passed a resolution declaring the pilasters to be inconvenient and incommodious to passengers along the footway, and served the appellant with a notice to remove them forthwith, and upon his neglecting to comply with the notice took out a summons against him under s. 72 of Michael Angelo Taylor's Act. The magistrate convicted the appellant:—*Held*, that the conviction must be quashed on the grounds:—1. That s. 119 of the Metropolis Management Act, 1855, was inconsistent with and impliedly repealed s. 72 of Michael Angelo Taylor's Act, and that consequently, assuming the projections in question were unlawful, the proceedings had been taken under the wrong Act. 2. That the projections in question were not unlawful, for that s. 26 of the Metropolitan Building Act, 1855, authorized projections beyond the general building line (to the limited extent therein specified) whatever the position of the building line might be, and not only where the building line being set back from the street the projections were capable of being made on private land. *Vestry of St. Mary, Islington* v. *Goodman* (23 Q. B. D. 154) overruled. FORTESCUE *v.* THE VESTRY OF ST. MATTHEW, BETHNAL GREEN - - - - 170

MILK—Adulteration—Delivery in several cans—Separate informations in respect of samples from more than one can - 304
See ADULTERATION. 2.

MINE—*Wages—Payment by Weight of Mineral—"Actual Weight gotten of Mineral contracted to be gotten"—Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 17—*Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 12, *sub-s.* 1.] By s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887, "where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten . . . provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten." The plaintiffs were employed in the defendants' collieries to cut large coal at wages which depended on the weight gotten. The coal was cut as large coal, but a considerable amount of small coal was produced in the conveyance of the coal to the pit's mouth and screening it. The coal raised was screened at the pit's mouth, and the defendants made deductions from the plaintiffs' wages in respect of the small coal found in it. The plaintiffs sued the defendants for the amounts so deducted:—*Held*, affirming the decision of the Divisional Court, that the small coal was part of "the mineral contracted to be gotten" within s. 12, sub-s. 1, of the Coal Mines Regulations Act, 1887, and that the deductions were illegal, and the plaintiffs were therefore entitled to recover:—*Held*, also, that the sums allowed for the small coal were to be at the same rate as that paid for the large coal. *Netherseal Colliery Co.* v. *Bourne* (14 App. Cas. 228) followed. BRACE *v.* ABERCARN COLLIERY COMPANY. HUGGINS *v.* LONDON AND SOUTH WALES COLLIERY COMPANY - C. A. 699.

MORTGAGE—Subsequent lease by mortgagor—Notice to pay rent to mortgagee—Possession of tenant after notice - 484
See LANDLORD AND TENANT. 4.

NEGLIGENCE—Liability of owner of traction engine—Master and servant - 403
See LOCOMOTIVE ON HIGHWAY.

—— Master and servant—Liability of bailee for hire for negligence of servant - 413
See BAILMENT.

NUISANCE—Smelting works—Right of Local Board to sue as owners of property affected—Right of Local Board to act as relators in respect of public nuisance
See LOCAL GOVERNMENT. [100

—— Unsound meat—Deposit with salesman—Offence - - - - 107
See LOCAL GOVERNMENT. 2.

OFFICIAL REFEREE—Jurisdiction to order commission to examine witnesses - 236
See PRACTICE. 7.

PARTICULARS—Signature of solicitor—County Court - - - - 208
See COUNTY COURT.

—— Libel—Justification - - - 582
See PRACTICE. 14.

PATENT, INFRINGEMENT OF—Title to a franchise—County Court—Jurisdiction
See COUNTY COURT. 3. [263

POOR LAW—*Removal by Order before the Divided Parishes Act*, 1876—*Subsequent Residence without Relief—Settlement—"Pauper removed"*—39 & 40 *Vict. c.* 61, *s.* 36.] The enactment in s. 36 of the Divided Parishes Act, 1876, that the provisions relating to settlement contained in that Act shall not apply to any pauper removed under any order of removal before the passing of the Act, applies only to those paupers who have been so removed, and who remained paupers at the passing of the Act. GUARDIANS OF PARISH OF BRIGHTON *v.* GUARDIANS OF STRAND UNION - C. A. 156

—— Pauper lunatic—County asylum—Additional charge—Power to fix amount of charge - - - - 110
See LOCAL GOVERNMENT. 3.

POOR RATE—*Occupation of Part of a House—Rateable Hereditament—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 7, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5.] A house not structurally severed was let partly to one tenant and partly to another, and each had the exclusive occupation of the part let to him. There was a staircase leading from the front door to the upper rooms, and a joint user of the front garden and the back yard, in which was a closet. The tenants were jointly assessed in respect of the whole house, and rated as joint occupiers. The rate was confirmed by the respondents. On a case stated by quarter sessions:—*Held*, affirming the judgment of the Queen's Bench Division, that the tenants could not be rated as joint occupiers, but that each was the occupier of a separate tenement capable of being rated, and each should be rated separately. ALLCHURCH *v.* ASSESSMENT COMMITTEE AND GUARDIANS OF HENDON UNION [C. A. 436

—— Metropolis—Valuation—Valuation lists—Totals of gross and rateable values—Alteration of—Reduction in value of hereditaments - - - 712
See METROPOLIS. 4.

PRACTICE—*Counter-claim—Discontinuance of Action—Power to Order Trial of Counter-claim in County Court after Discontinuance of Action—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.] A counter-claim in an action cannot, after the action has been discontinued, be remitted for trial to a county court under s. 65 of the County Courts Act, 1888. THE QUEEN *v.* JUDGE OF CITY OF LONDON COURT - - 71

2. —— *Judgment Creditor—Receivership Order, Effect of—Date from which Receivership Order takes effect.*] The respondents recovered judgment for a sum of money against a foreign company carrying on business in France. Goods belonging to the company being, at the date of the judgment, in the possession of a firm in

PRACTICE—*continued.*

England who had a lien upon them; the respondents obtained in chambers, ex parte, an order appointing a receiver of the company's interest in the goods, and directing that any money received by him should be paid to the respondents in satisfaction of their debt. Shortly after the receivership order was made the company was adjudicated by a French Court to be in judicial liquidation, and the appellants were appointed liquidators. Subsequently, the appellants having claimed to be entitled to the goods, under orders made by the Queen's Bench Division, the goods were sold; the lien was paid off; the balance in the hands of the receiver was paid into Court, and an issue was directed to try whether the appellants or respondents were entitled to such balance:—*Held*, affirming the judgment of Day, J., at the trial of the issue, that, assuming that by the law of France the appellants became entitled to the goods at the date of the liquidation, yet the receivership order had the effect of entitling the respondents to the goods, or the proceeds of them, as and from the date upon which it was made, subject only to the discharge of the lien which was a legal impediment to execution, and, therefore, that the respondents were entitled to the balance paid into court. LEVASSEUR *v.* MASON & BARRY, LIMITED - - C. A. 73

3. —— *Service of Writ — Action against Foreign Firm—Issue of Writ in Firm name—Service on Partner Resident within Jurisdiction—Order IX., r. 6; Order XI.*] A writ was issued against a foreign firm in respect of the breach of a contract made and to be performed in England. The writ was issued in the firm name, and was served on one of the three partners who was resident in England, the other two residing out of the jurisdiction. On an application, before appearance, by the partner who was served to set aside the writ and service:—*Held* (reversing the decision of the Queen's Bench Division), that the partners resident abroad could only be brought in by leave under Order XI.; that a writ in the firm name was not available against them, and that, consequently the writ must be set aside. HEINEMANN & Co. *v.* HALE & Co. [C. A. 83

4. —— *Service of Notice of Writ—Action against Foreign Firm—Order XI., r. 6; Order XI., r. 7.*] The plaintiffs brought an action for breach of contract made within the jurisdiction, against foreign partners in the name of their firm. The partnership had neither place of business nor property within the jurisdiction, and all the partners resided out of the jurisdiction. Leave was obtained to serve notice of the writ out of the jurisdiction, and service was effected by serving notice on one of the partners. The defendants did not appear, and the plaintiff applied for leave to sign judgment for want of appearance:—*Held*, that the plaintiffs were not entitled to judgment, for Order XI., r. 6, did not apply to a foreign firm, and the service on one partner was not good service on the firm. DOBSON *v.* FESTI, RAISINI & Co. - - C. A. 92

5. —— *Costs—Trial with Jury—Discretion of Judge—Place of Trial—"For good cause"—Order LXV., r. 1.*] The plaintiff, who lived in Cheshire, sued the defendant, who lived in Flintshire, for a sum of 640*l.* The plaintiff not naming a place of trial, the action was tried in Middlesex, the defendant not having applied to change the venue. The jury found a verdict for the plaintiff for 200*l.*:—Ordered, on an application on behalf of the defendant, under Order LXV., r. 1, that the plaintiff should be allowed, as against the defendant, one-third of his costs, such costs to be taxed treating the trial as having taken place at Chester, and that the defendant should be allowed, as against the plaintiff, two-thirds of his costs, such costs to be taxed treating the trial as having taken place in Middlesex. The plaintiff, who carried on business at Halifax, in Yorkshire, brought an action against the defendants, a railway company, to recover damages for personal injuries and loss of trade sustained by him owing to a collision which occurred on their railway near Halifax, claiming 262*l.* for injuries and 6388*l.* for loss of trade. The plaintiff named Middlesex as the place of trial. The defendants applied to change the venue to Leeds, but the application was refused. The jury found a verdict for the plaintiff for 800*l.*:—Ordered, on an application on behalf of the defendants, under Order LXV., r. 1, that the plaintiff should have his costs so far as related to the claim for personal injuries, such costs to be taxed treating the trial as having taken place at Leeds, and should pay to the defendants all their costs so far as related to the claim for loss of trade, such costs to be taxed treating the trial as having taken place in Middlesex, and also the difference in the expenses of the defendants' medical evidence arising from the action having been tried in Middlesex instead of at Leeds. ROBERTS *v.* JONES. WILLEY *v.* GREAT NORTHERN RAILWAY COMPANY - - - - 194

6. —— *Trial—Default of appearance of Plaintiff—Form of Entry of Judgment—Order XXXVI., r. 32.*] If, when a trial is called on, the defendant appears and the plaintiff does not appear, and there is no counter-claim, the defendant is not entitled under Order XXXVI., r. 32, to have judgment entered for him, but judgment should be entered dismissing the action for default of appearance of the plaintiff. ARMOUR *v.* BATE - - - - C. A. 233

7. —— *Reference—Official Referee—Jurisdiction to order Commission to examine Witnesses—Jurisdiction to review Referee's Decision—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15, 16—*Rules of Supreme Court*, 1883, *Order XXXVI., rr.* 48, 49, 50.] An official referee, to whom an action is referred for trial, has jurisdiction to make an order granting a commission to examine witnesses abroad, and a judge at chambers has jurisdiction to review the decision of the official referee granting or refusing such an order. HAYWARD *v.* MUTUAL RESERVE ASSOCIATION - - - - - 236

8. —— *Commission issued by Court in another part of the United Kingdom—Production of Documents—Persons not parties to the proceeding—6 & 7 Vict. c.* 82, *s.* 5.] In pursuance of a commission issued by the Court of Session, in an action pending in Scotland with regard to the sale of a

PRACTICE—*continued.*

vessel by the defenders to the pursuers, an order was made at chambers under 6 & 7 Vict. c. 82, s. 5, that the chairman and secretary of Lloyd's should attend before the commissioner for examination as to, and to produce the documents which Lloyd's had under their control answering the description in the specifications of documents by the pursuers and the defenders. The specifications stated that the documents called for were correspondence between Lloyd's and their surveyor at Hamburg, relating to the condition or the surveys of the vessel between certain dates, and all reports and communications addressed to Lloyd's by their agent at Hamburg relating to these matters. On appeal against this order:—*Held* (reversing the decision of the Queen's Bench Division), that the only process intended to be enforced by the statute was the production of documents as ancillary to the examination of a witness; that the order amounted to one for discovery against persons not parties to the action; and that there was no jurisdiction to make such an order BURCHARD *v.* MACFARLANE. EX PARTE TINDALL, - - - C. A. 241

9. —— *Costs — County Court — Admiralty Jurisdiction Act,* 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 9—*Rules of the Supreme Court,* 1883, *Order* LXV., *r.* 1.] Sect. 9 of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that persons taking proceedings in a superior Court, which they might under s. 3 of that Act have taken in a county court, shall not be entitled to costs, unless the judge before whom the cause was tried shall certify that it was a proper cause to be tried in a superior Court, is inconsistent with and is repealed by Order LV., r. 1, of the Rules of the Supreme Court, 1875, and Order LXV., r 1, of the Rules of the Supreme Court, 1883. *Tenant* v. *Ellis* (6 Q. B. D. 46), approved. ROCKETT *v.* CLIPPINGDALE - - C. A. 293

10. —— *Costs—Taxation—Counsel's Fees—Refreshers.*] By Order LXV., r. 27 (48), where a cause is tried on viva voce evidence in open Court, "if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours have expired, the following fees. . ." A trial extended over parts of two days, lasting altogether about five and a quarter hours; it occupied less than five hours on each day. Upon taxation of costs as between party and party, the master disallowed a refresher fee to the successful party's counsel in respect of the second day:—*Held,* that a right to a refresher fee could only arise where the trial had lasted a "clear day" beyond the first five hours, whether "clear day" meant a separate day of the week, or only an additional period of five hours, and that therefore the master was right. WALKER *v.* CRYSTAL PALACE DISTRICT GAS COMPANY - - 300

11. —— *Appeal—Jurisdiction—Order for Abatement of Nuisance—Mandamus to Compel Magistrate to State Case—"Criminal Cause or Matter"—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 91, 96.] The Queen's Bench Division having refused to grant an order nisi for a mandamus to compel a stipendiary magistrate who had made an order, under s. 96 of the Public Health Act, 1875, for the abatement of a nuisance, to state a case for the opinion of the Court, the applicant moved, ex parte, by way of appeal from the Queen's Bench Division for an order nisi in the Court of Appeal:—*Held,* that the decision of the Queen's Bench Division was given in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore that the Court of Appeal had no jurisdiction to entertain the application for a mandamus. EX PARTE SCHOFIELD - - - C. A. 428

12. —— *County Court—Order of County Court Judge for New Trial—Appeal to High Court—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 120.] Although an appeal to the High Court lies, under s. 120 of the County Courts Act, 1888, against an order of a county court judge granting a new trial, on the ground that his decision is wrong in point of law, no such appeal lies where the order is made solely on the ground that the verdict is against the weight of evidence. HOW *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY - - - - 496

13. —— *Time for Appealing—Interpleader Issue, Judgment on—Interlocutory Order—Order* LVIII., *r.* 15; *Order* LVII., *r.* 13.] An appeal from the decision of a judge on an interpleader issue tried by him without a jury must, under Order LVIII., r. 15, be brought within twenty-one days. MCNAIR & CO. *v.* AUDENSHAW PAINT AND COLOUR COMPANY - - - C. A. 502

14. —— *Particulars — Libel — Justification.*] The plaintiff applied for an order for particulars of a defence of justification pleaded to an action for libel contained in a review of a book written by him. The review stated that the plaintiff was, by his own confession, a most barefaced liar:—*Held,* that the plaintiff was entitled to particulars of the passages in his book on which the defendants relied in support of the defence of justification, and that such particulars must specify the pages in the book at which the several passages relied on occurred, and the first and last words of such passages. DEVEREUX *v.* CLARKE & CO. - - - - - - 582

15. —— *Writ specially indorsed—Application for Judgment—Amendment of Indorsement after Summons taken out—Order* III., *r.* 6; *Order* XIV., *r.* 1.] In order to entitle a plaintiff to enter final judgment under Order XIV., r. 1, the writ of summons must be a good specially indorsed writ under Order III., r. 6, at the time when the summons under Order XIV. is taken out. Where, therefore, the indorsement on a writ was amended after the issue of a summons under Order XIV. by striking out an unliquidated demand:—*Held,* that there was no jurisdiction to make an order giving the plaintiff leave to enter final judgment. GURNEY *v.* SMALL. - - - - 584

16. —— *Appeal—"Criminal Cause or Matter"—Joint Stock Company—List of Members—Default in forwarding List to Registrar—Mandamus to hear Application for Summons—Companies Act,*

PRACTICE—*continued.*

1862 (25 & 26 *Vict. c.* 89), *ss.* 26, 27—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.] A magistrate having refused to issue a summons under s. 27 of the Companies Act, 1862, against a company, to recover penalties for default in forwarding a list of its members to the Registrar of Joint Stock Companies as required by s. 26 of the Act, the Queen's Bench Division granted a rule nisi for a mandamus directing him to hear and determine the application for a summons. The rule was by a subsequent order of the Court discharged. On appeal against this order:—*Held*, that the application to the magistrate for a summons against the company was a criminal proceeding, and that, therefore, the judgment of the Queen's Bench Division was a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, and that no appeal would lie. THE QUEEN *v.* TYLER AND THE INTERNATIONAL COMMERCIAL COMPANY, LIMITED - - 2 C. A. 588

17. —— *Discovery—Inspection of Documents—Documents referred to in Answer to Interrogatories—Order for Inspection without second Deposit of 5l.—Rules of Supreme Court*, 1883, *Order* XXXI., *rr.* 15, 17, 18, 26.] Where interrogatories have been delivered, and the deposit of 5*l.* required by Order XXXI., r. 26, made, and the affidavit in answer refers to documents, an order can be made for inspection of such documents without requiring a further deposit. MOORE *v.* PEACHEY - - - - - - 707

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REVENUE—*Income Tax—Profits of Trade—Brewers carrying on Business of Bankers and Money-lenders—Bad Debts on Loans—Deduction from Profits of Brewery*—5 & 6 *Vict. c.* 35, *s.* 100, *Sched. D*—16 & 17 *Vict. c.* 34.] The appellants carried on the business of brewers, and also as a branch or adjunct of their brewery business, the business of bankers and money-lenders, and in the course of such business lent money to their customers on security, and received money on deposit from their customers, who were allowed to draw bankers' cheques or orders on the appellants. In no case was any loan or advance made by way of permanent investment, but the same was taken only in connection with the current dealings and transactions of the customer with the appellants, and, in the event of such current dealings or transactions terminating, the loan or advance was required to be paid off, and the account closed. The profits of the brewery were largely increased by the addition of the banking and money-lending business, and the loans were necessary to enable the appellants to realize profits. They claimed to deduct from an assessment to the income tax on profits from trade, bad debts in respect of loans to customers:—*Held* (distinguishing *Watney* v. *Musgrave* (5 Ex. D. 241)), that, on the facts above stated, the appellants must be taken to have carried on one business only, that the money advanced to customers was used in the business, and not capital invested, and that the appellants were entitled to the deduction claimed. REID'S BREWERY COMPANY *v.* MALE - - - - - 1

2. —— *Income Tax—Trading Business carried on in England with Branches Abroad—Profits earned Abroad and not remitted to England—"Foreign Possessions"—Income Tax Acts*, 5 & 6 *Vict. c.* 35, *s.* 100; 16 & 17 *Vict. c.* 34, *s.* 2, *sched. D.*] A company, registered under the Joint Stock Companies Acts, carried on business as bankers in London, with branches abroad. The directors and shareholders met at the head office in London, where the business of bankers (other than that of current banking accounts) was carried on, and from whence the affairs of the company were directed and managed, the seat of power being in London with the directors. All usual banking business was conducted at the branches abroad by managers, subject to general directions and instructions for management issued by the head office in London. The company's dividends were paid in London, an adjustment of balances being from time to time made between the head office and the branches, and no special remittance of profits from the branches for the purpose of paying the dividends was ordinarily made. Of the profits earned at one of the branches in Mexico, a portion was not remitted to England, but was applied to paying, in Mexico, the consideration for certain rights and concessions purchased by the company from another bank in that country:—*Held* (affirming the decision of the Queen's Bench Division), that, on the above facts, the company were liable to pay income tax under 16 & 17 Vict. c. 34, s. 2, sched. D, in respect of the profits earned in Mexico and not remitted to England. *Colquhoun* v. *Brooks* (14 App. Cas. 493) distinguished. LONDON BANK OF MEXICO AND SOUTH AMERICA *v.* APTHORPE - C. A. 378

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3. —— *Duties on Settlements of Personal Property—Voluntary Settlement—Instrument not taking effect as a Will—Marriage Settlement—Power of Appointment—Customs and Inland Revenue Acts*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38; 1889 (52 & 53 *Vict. c.* 7), *s.* 11.] By 44 & 45 Vict. c. 12, s. 38, stamp duties are imposed in respect of accounts delivered of personal property, including any property "passing under any past or future voluntary settlement" made by any person dying on or after June 1, 1881, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life is reserved to the settlor; and by 52 & 53 Vict. c. 7, s. 11, the expression "voluntary settlement" includes any trust in favour of a volunteer, whether the deed or instrument effecting the settlement was made for valuable consideration or not as between the settlor and any other person. By a settlement made in consideration of marriage, H. transferred personal property to trustees upon trust to pay the income to herself for life; and, if certain events should happen, after her death upon trust for such person or persons as she, notwithstanding coverture, might appoint. The events happened, and H. died in 1888, having, during her coverture, by deed exercised the power of appointment in favour of a niece:—*Held*, that the property so appointed to the niece must be taken to be property "passing under" the marriage settlement; that the settlement and deed of appointment constituted a voluntary settlement whereby a life interest was reserved to the vendor within the meaning of s. 38 of 44 & 45 Vict. c. 12, and therefore that duty was payable in respect of such property. ATTORNEY-GENERAL *v.* CHAPMAN - - - 526

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SHIP—*Charterparty—Bill of Lading—Liability of [Owner of Chartered Ship — Principal and Agent — Master — Charterer's Shipping Agent Ashore.]* The defendant, being the owner of a ship and registered as managing owner, chartered her for a period of four months to G. It was provided by the charterparty that the captain, officers, and crew (with the exception of the chief engineer) should be appointed and paid by the charterer, and they were in fact so appointed and paid. The charterparty reserved to the owner sufficient space for ship's officers, crew, tackle, and stores; and it was also thereby provided that the captain should be under the orders of the charterer, and that the charterer should indemnify the owner from all liability arising from the captain signing bills of lading. The plaintiffs shipped on board her certain bales of cotton under bills of lading, some of which were signed by the captain, and the rest by a firm of R. K. & Co., who acted as the charterer's agents at the port of shipment. Neither the captain nor R. K. & Co. had any authority to sign bills of lading on behalf of the defendant. This fact was, however, unknown to the plaintiffs, who had no knowledge that the ship was under charter, but shipped the cotton under the belief that the bills of lading were signed on behalf of and with the authority of the owner. At the time the bills of lading were signed the defendant knew who the captain was, and also who the charterer's shipping agents were, but he had no knowledge of the fact or circumstances of the shipment. The cotton having, during the currency of the charter, been lost at sea (as was alleged) by perils not excepted by the bills of lading, the plaintiffs sued the defendant for the loss:—*Held*, by Charles, J., that the plaintiffs, in the absence of notice to the contrary, were entitled to assume that the persons signing the bills of lading had authority from the owner to sign them on his behalf, and that the defendant was consequently under the circumstances responsible for the safe carriage of the goods; and that he was so as well in respect of the goods specified in the bills of lading signed by R. K. & Co., as in respect of those specified in the bills

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of lading signed by the captain. BAUMVOLL MANUFACTUR VON SCHEIBLER *v.* GILCHREST AND FURNESS - - - - - - 310

2. —— *Bill of Lading—Demurrage—Wrongful Detention by Delay in unloading Cargo—Reasonable Time—Delay not caused by Default of Defendant—Strike of Dock Labourers.*] In an action by the plaintiff, the shipowner, against the consignees of the cargo for delay in unloading the ship it appeared that the defendants were consignees under a bill of lading which imposed no express limit of time within which the goods were to be unloaded, but contained a stipulation that the goods were to be applied for within twenty-four hours after the ship's arrival, otherwise the master of the ship might himself unload at the expense of the consignees, and should have a lien on the goods for all freight and expenses. The ship arrived in the port of discharge, and the defendants duly applied for the goods and commenced to unload them; but a strike of the dock labourers occurred, and the unloading was delayed for about a month, and was then completed by the defendants Both plaintiff and defendants did all they could under the circumstances to expedite the unloading of the ship:—*Held*, that the bill of lading containing no stipulation as to the time within which the cargo was to be discharged, the defendants were entitled to a reasonable time, and that in the absence of any special provision on the subject the reasonableness of the time for unloading must be considered with reference to the circumstances which existed at the time of unloading; and that as the strike could not be attributed to any default on the part of the defendants, they were not liable for the delay. HICK *v.* RODOCANACHI AND OTHERS - - - C. A. 626

3. —— *Charterparty—Termination of Voyage—Delivery at Safe Berth as ordered—Demurrage.*] By a charterparty the vessel was to proceed to the Mersey and deliver her cargo at any safe berth as ordered on arrival in the dock at Garston. On arrival a berth was ordered, but, owing to the crowded state of the dock, delay occurred which prevented the vessel being berthed for some time after arrival. On a claim by the shipowners for demurrage arising from the delay:—*Held*, affirming the judgment of Charles, J., that the obligation of the charterers to unload did not commence till the vessel was berthed. THARSIS SULPHUR AND COPPER COMPANY, LIMITED *v.* MOREL BROTHERS & CO., AND OTHERS - - C. A. 647

4. —— *Bill of Lading—Trover—Pledge—Bills of Lading Act* (18 & 19 *Vict. c.* 111), *s.* 1.] In an action for wrongfully depriving the plaintiffs of goods, it appeared that the goods had been consigned to England from a colony. The bills of lading provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee against the consignment, and sold the bills of exchange, with the bills of lading annexed, which he had endorsed in blank, to a colonial bank, who sent them to a bank in London, with a hypothecation note empowering the London bank to sell the goods if the bills of exchange were not accepted or not paid at

SHIP—*continued.*

maturity. The goods arrived in England, and were delivered to the defendants, who were a railway company, to be delivered to the order of the shipowners. The consignee paid the freight and other shipping charges and accepted the bills of exchange, but before the bills became due, he induced the defendants wrongfully to deliver the goods to him without producing a delivery order from the shipowners. When the bills became due the consignee requested the plaintiffs to advance the money and take up the bills. They did so, and received the bills of exchange and the bills of lading from the London bank, and ultimately obtained delivery orders from the shipowners in exchange for the bills of lading. When they presented the delivery orders to the defendants they found that the goods had been already given up to the consignee, and they thereupon commenced the present action:—*Held*, first, that the plaintiffs must be taken to be pledgees of the goods, and had therefore a property sufficient to entitle them to maintain the action independently of the Bills of Lading Act. Secondly, that the plaintiffs' right of action was not affected by the fact that at the date of the wrongful delivery they had not acquired their title to the goods. BRISTOL AND WEST OF ENGLAND BANK *v.* MIDLAND RAILWAY COMPANY. [C. A. 653

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